Office Supreme Court, U. S.
FILED
DEC 31 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 662

IN THE MATTER OF GLOBE VARNISH COMPANY, A CORPORATION, DEBTOR.

S. L. NUDELMAN, DIRECTOR OF FINANCE OF THE STATE OF ILLINOIS,
Petitioner,

vs.

GLOBE VARNISH COMPANY, A CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN E. CASSIDY,
Attorney General of the State of Illinois,
MONTGOMERY S. WINNING,
EDWIN T. BREEN,
ELI J. BIBO,
PHILIP J. SIMON,
Assistant Attorneys General of the State of Illinois,
Of Counsel,
Attorneys for Petitioner.

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IN THE

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OCTOBER TERM, A. D. 1940

No. .....

IN THE MATTER OF GLOBE VARNISH COMPANY, A CORPORATION, DEBTOR.

S. L. NUDELMAN, DIRECTOR OF FINANCE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

GLOBE VARNISH COMPANY, A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, S. L. Nudelman, Director of Finance of the State of Illinois, respectfully prays for the issuance of a writ of certiorari herein, directed to the United States Circuit Court of Appeals for the Seventh Circuit, to review a certain final decision of the said Circuit Court of Appeals in the above entitled cause, the opinion and decision having been rendered and filed on July 23, 1940,

and a Petition for Rehearing having been filed on the 6th day of August, A. D. 1940, within the time allowed for filing of the same in accordance with the provisions of Rule 22 of the Rules of the United States Circuit Court of Appeals for the Seventh Circuit, which said Petition for Rehearing, after being entertained and considered by the said Court, was denied on the first day of October, A. D. 1940, and this Petition for the issuance of a writ of certiorari together with a supporting brief annexed hereto and a certified transcript of record being filed herewith in this Court within three (3) months after denial of the said Petition for Rehearing by the said United States Circuit Court of Appeals for the Seventh Circuit.

I.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

For convenience sake and to better follow the proceedings in the courts below, the Petitioner herein, S. L. Nudelman, Director of Finance of the State of Illinois, will be referred to as the Claimant; and the Respondent, Globe Varnish Company, a corporation, will be referred to as the Debtor.

In the reorganization proceedings of the Debtor, Globe Varnish Company, a corporation, instituted under Section 77-B, in the District Court of the United States, for the Northern District of Illinois, Eastern Division, the Claimant, S. L. Nudelman, Director of Finance of the State of Illinois, filed an amended claim in the sum of $1,594.87 for taxes alleged to be due to the State of Illinois under the Illinois Retailers' Occupation Tax Act.

The Debtor filed objections to this claim; and the claim and objections thereto were referred to Carl R. Chindblom,

Referee in Bankruptcy, as Special Master. Evidence was heard and taken before the Special Master and he submitted a Supplemental Report, recommending that the Debtor's objections to the amended claim be overruled and that the claim be allowed in full for the said sum of $1,594.87.

The Debtor filed exceptions to the Supplemental Report of the Special Master. The matter came on for hearing before the District Court on the said exceptions, and an order was entered disapproving the Supplemental Report as to a portion of the claim, the disallowed portion being in the sum of $560.57.

The errors relied on for reversal in the United States Circuit Court of Appeals for the Seventh Circuit arose out of the District Court's finding that the disallowed portion of the claim represented a tax on sales made by the Debtor to the railroads, requiring the movement of the materials sold across State lines and therefore being held to be transactions in interstate commerce.

There is no material dispute between the parties as to the facts involved. The Debtor, Globe Varnish Company, was engaged in the business of selling tangible personal property for use or consumption within the purview of the Illinois Retailers' Occupation Tax Act. It is an Illinois corporation with its principal place of business at Chicago, Illinois. The railroad companies, to whom the sales had been made, all had offices and freight stations at Chicago, Illinois.

By Stipulation filed in the District Court, the parties agreed that the claim of the Claimant in the total sum of $1,594.87, consisted of $1,034.30 due on account of sales alleged to have been made to painting contractors, and the further sum of $560.57 which was alleged to be due as a tax on sales by the Debtor to railroads. (Stipulation, Rec.

52, 53.) The tax alleged to be due on these latter sales is the matter in controversy in the case at bar.

The transactions of sale involved were all of a similar nature, the Debtor's Exhibits 1, 1A, 2 and 2A, having by Stipulation been taken as typical. (Stipulation, Rec. 52, 53.) In each instance, an order would be sent to the Debtor from the Chicago office of the railroad for the purchase of certain specified materials, the consignee being designated as an out-of-State shop or office of the purchasing railroad. All orders were f.o.b. Chicago and required delivery by the Debtor to the local (Chicago) freight station of the purchasing railroad, thence to be forwarded to an out-of-state shop or office of the railroad via its own lines.

In each instance the Debtor delivered the materials to the local (Chicago) freight station of the purchasing railroad for shipment to its out-of-state shop or office. The Debtor would receive a bill of lading acknowledging receipt of the materials for shipment out of the State, a waybill would be issued in accordance with the conditions of the bill of lading, and the materials were placed in a car of the purchasing railroad and transported from Chicago to its out-of-state shop or office. The Claimant for the purpose of the record did not deny that the materials actually were shipped by the railroad to its out-of-state shop or office.

While considerable evidence was heard and taken before the Special Master, in the main it is not of material importance in determining the issues involved. The Claimant is of the belief that the meat of this testimony was contained in a few brief statements made by the Debtor's own witness, B. B. Melgaard, the assistant to the purchasing agent at the Chicago office of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company. This pertinent tes-

timony is at the top of page 47 of the Transcript of Record:

> "Q. In other words, it does not show the consignee is—
> A. (Interrupting.) The consignee here is the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, storekeeper, Milwaukee Shops, Milwaukee Wisconsin.
> Q. They are the purchasers and they are also the carrier, the transporter?
> A. That is right. We carry our material to our shops at Milwaukee."

This is a clear indication that the railroad had no doubts as to whose material it was transporting from Chicago, Illinois, to Milwaukee, Wisconsin. As the witness stated, the railroad was carrying its own property, and not the property of the Debtor.

It may only be necessary to add that since the transactions were f.o.b. Chicago, the Debtor paid no freight. There also was nothing to show that the railroad had set up on its own books or records any freight charges for the transportation of the materials from its Chicago freight station to its out-of-state shop or office.

The District Court made a finding that in these sales to the railroads "the movement of the materials across State lines was an essential part of the sales, and that, therefore, the sales were transactions in interstate commerce and not subject to the tax. Said claim should be disallowed to the extent that it represents taxes on the receipts from the sales of this kind to the railroads." (Order, Rec. 85.) It was from this portion of the order, overruling the recommendation contained in the Special Master's Supplemental Report, that the Claimant perfected an appeal to the United States Circuit Court of Appeals for the Seventh Circuit.

The said Circuit Court of Appeals rendered an opinion and decision affirming the order of the District Court. It is noteworthy, however, that the court's opinion was not unanimous. The majority opinion was delivered by the Honorable, Judge William M. Sparks, and concurred in by the Honorable, Judge J. Earl Major. The Honorable, Judge Walter C. Lindley did not concur with the majority and filed a vigorous dissenting opinion, upholding the validity of the tax on the sales by the Debtor to the railroads. Both the majority and the dissenting opinions are set forth verbatim in the appendix attached.

II.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is based upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; Chapter 229, 43 Stat. 936; entitled "An Act To Amend The Judicial Code, and to further define the jurisdiction of the Circuit Court of Appeals and of the Supreme Court, and for other purposes," and reading as follows:

> "Sec. 240. (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect as if the cause had been brought there by unrestricted writ of error or appeal."

The Court may entertain jurisdiction by virtue of Rule 38 of the Revised Rules of the Supreme Court of the

United States, adopted February 13, 1939, and effective as of February 27, 1939, subsection 5 (b) thereof reading as follows:

> "5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

The special and important reasons advanced by the Petitioner and addressed to the Court's judicial discretion are set forth under Point IV of this Petition, entitled "Reasons Relied On for the Allowance of the Writ."

The United States Circuit Court of Appeals for the Seventh Circuit on July 23, 1940, *by a divided court* affirmed the order or decree of the District Court of the United States, for the Northern District of Illinois, Eastern Division. (Rec. 112.) A Petition for Rehearing was filed on August 6, 1940, within the time allowed as provided by Rule 22 of the Rules of the United States Circuit Court of Appeals for the Seventh Circuit (Rec. 112-113); and the said Petition for Rehearing was denied on October 1, 1940. (Rec. 113.)

A certified Transcript of Record, the Petition for the issuance of a writ of certiorari herein, and the supporting Brief annexed thereto are filed herein with the Clerk of this Court within three (3) months after denial of the said Petition for Rehearing by the United States Circuit Court of Appeals for the Seventh Circuit.

III.

QUESTIONS PRESENTED.

1. Whether interstate commerce is involved where a common carrier purchases tangible personal property, accepts delivery of or title to the said property within the State of purchase, and then transports the said property by its own means of carriage to a foreign State for its own use or consumption.

2. Whether a non-discriminatory State occupation tax, measured by the gross receipts on sales derived from engaging in the occupation of selling tangible personal property for use or consumption, is applicable to a sale of such property to a common carrier where the contract of sale provides for delivery of the property to a shop or office of the common carrier in a foreign State, but where delivery is actually made and title is passed to the carrier within the State of origin and the property is then transported by the carrier's own facilities to its shop or office in a foreign State for its own use or consumption.

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1.

The United States Circuit Court of Appeals for the Seventh Circuit has decided an important question of local law in a way probably in conflict with a State statute.

Section 2 of the Illinois Retailers' Occupation Tax Act (1939) Illinois Revised Statutes [Bar Ass'n Ed.], Chapter 120, Par. 441) provides in part as follows:

> "Section 2. A tax is imposed upon persons engaged in the business of selling tangible personal property at retail in this State * * *."

In defining the phrase "selling * * * at retail", Section 1 of the Act (1939 Illinois Revised Statutes [Bar Ass'n Ed.], Chapter 120, Par. 440) provides in part as follows:

> "Section 1. 'Sale at retail' means any transfer of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration."

Thus as provided by the two above Sections of the Act, any and all persons engaged in the business or occupation of selling tangible personal property at retail within the State of Illinois come within the purview of the said Act. Further, selling at retail is defined as any transfer of the ownership of, or title to tangible personal property to a purchaser for use or consumption.

With reference to the passage of title as determining whether or not the sales in the case at bar were within

the purview of the Act, the majority opinion rendered by the Circuit Court of Appeals read as follows:

> "In the instant case, we think it makes no difference when the title passed, and we are unable to perceive how that fact, whenever it occurred, could be determinative of the character of the sale, as to whether it was an interstate or an intrastate transaction." (Opinion, Rec. 105.)

On the same point, Judge Lindley in his dissenting opinion said the following:

> "When this vendor delivered the merchandise to the carrier in Chicago, receiving bills of lading acknowledging receipt of the merchandise, under contracts of sale providing for delivery f.o.b. Chicago title passed to the purchaser. Performance of the contract of sale was completed in Illinois, *People* v. *Young*, 237 Ill. 196 at 201. The seller parted with its title there; the purchaser acquired title there. Thereafter the property was that of the vendee, and the seller had no interest therein. The property was from that time thenceforth under the domain and control of the buyer, who alone was endowed with the right to recover for damage thereto in transit, *Pacific Exp. Co.* v. *Spaulding & Co.*, 199 Ill. App. 474. The sales were completed in Illinois, title passed in Illinois, and the taxes assessed in no wise conflict, infringe upon or cast a burden upon interstate commerce." (Rec. 108, 109.)

The Petitioner submits that the majority opinion rendered by the Circuit Court of Appeals in this particular has limited the interpretation placed by the Illinois Retailers' Occupation Tax Act upon what constitutes a "sale at retail" within the purview of the said Act.

2.

The decision of the Circuit Court of Appeals is in conflict with and nullifies Article IX, Section 1, of the Constitution of the State of Illinois. The said decision also has adjudicated an important question of local law in a way probably in conflict with applicable local decisions.

Article IX, Section 1 of the Illinois Constitution of 1870 provides in part as follows:

> "The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property—
> * * *"

This is what is known as the uniformity clause of the Illinois Constitution; and no principle has become more firmly established within the jurisdiction of the State of Illinois than the principle that there must be equality and uniformity in taxation.

Prior to the present Illinois Retailers' Occupation Tax Act, the State Legislature had enacted an occupation tax act which attempted to exempt from its provisions those engaged in the business of selling either farm produce or motor fuel. In the case of *Winter* v. *Barrett,* 352 Ill. 441, the Illinois Supreme Court ruled that these purported exemptions were in direct violation of the uniformity clause of the Illinois Constitution and held the entire act invalid.

The constitutionality of the present Illinois Retailers' Occupation Tax Act was attacked in the case of *Reif* v. *Barrett,* 355 Ill. 104, where the contention was raised that it violated the uniformity clause of the Illinois Constitution. However, the Illinois Supreme Court overruled this contention and held on page 122 of its opinion that "there is no lack of uniformity in the law or its application."

In the case of *Franklin County Coal Co.* v. *Ames*, 359 Ill. 178, where the Coal Company contended it was exempted from the operation of the Illinois Retailers' Occupation Tax Act because of the fact that it was a producer of coal and sold only in wholesale or carload lots, the court said on page 183 of its opinion:

> "If we were to construe the Act so as to exclude them from it, a lack of uniformity would result and the Act would be unconstitutional."

The decision of the Circuit Court of Appeals in the case at bar has the effect of exempting from the Act a certain class of sales consummated within the State of Illinois, to-wit: the sale of tangible personal property at retail to railroads. This not only conflicts with the uniformity clause of the Illinois Constitution but also with numerous decisions of the Illinois Supreme Court which have consistently sustained this principle of uniformity in taxation. Exemption from taxation is never to be presumed; but on the contrary the presumption is strongly against exemption from taxation of any person or group of persons falling within a particular class against whom a tax is operative.

3.

The United States Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court.

Approximately twenty-seven states in the Union and the City of New York have some form or other of sales tax laws. In all of these states, there are numerous railroads making purchases of tangible personal property for their own use or consumption; and the total amount of sales involved runs into millions of dollars annually. It has been estimated that in Illinois alone the Retailers' Occu-

pation Tax due on sales of tangible personal property to railroads, being three per cent of the gross sales, is in the approximate sum of one hundred thousand dollars yearly.

The question is whether or not these sales are in interstate commerce where the railroad, after making the purchase in Illinois, transports the property from Illinois to a foreign state for its own use or consumption. Then even if it should be assumed that these transactions are in interstate commerce, are they protected by the Commerce Clause of the Federal Constitution so as to exempt them from the operation of the Illinois Retailers' Occupation Tax Act?

This question as we have indicated is of paramount importance not only to the State of Illinois but to all the other states and the City of New York which have enacted sales tax laws.

There are two decisions bearing on the question that have been rendered by state appellate courts. In *Standard Oil Co. of California* v. *Johnson,* 92 Pacific (2d) 470, an appellate court of California held that transactions of this nature were in interstate commerce and not subject to the California Sales Tax Law. However, in *State Board of Equalization* v. *Blind Bull Coal Co.,* 101 Pacific (2d) 70, the Supreme Court of the State of Wyoming held that these transactions were *not* in interstate commerce and were within the purview of the Wyoming Sales Tax Act.

The precise question involved in the case at bar has never been submitted to or passed on by this Court; and in view of the generally wide interest in all the states having sales tax laws in addition to the State of Illinois, the Petitioner respectfully submits that this Court should entertain jurisdiction for a final adjudication of the issues involved.

4.

The United States Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court.

A.

In determining that the transportation by a common carrier of its own property across state lines is to be deemed as being in interstate commerce, the decision of the Circuit Court of Appeals is probably not in accord with the following applicable decisions of this Court:

Superior Oil Company v. *Mississippi,* 280 U. S. 390, 394, 395.

Eastern Air Trans. Inc. v. *So. Carolina Tax Commission,* 285 U. S. 147, 153.

The Pipe Line Cases, 234 U. S. 548, 561, 562.

Edelman v. *Boeing Air Trans. Inc.,* 289 U. S. 249, 252.

Nashville, C. & St. L. R. Co. v. *Wallace,* 288 U. S. 249, 267.

Pennsylvania R. R. Co. v. *Public Utilities Commission,* 298 U. S. 170, 173, 174.

B.

In determining that completed transactions of sale in the case at bar between residents of the same state are in interstate commerce, the decision of the Circuit Court of Appeals is probably not in accord with the following applicable decisions of this Court:

Schecter Poultry Corp. v. *United States,* 295 U. S. 495, 542, 543.

Atlantic Coast Line R. R. v. *Standard Oil Company,* 275 U. S. 257, 267.

Banker Bros. v. *Pennsylvania,* 222 U. S. 210, 214.

C.

In holding that a tax levied in one state upon property destined to be taken to and used in another state is to be deemed a direct burden on interstate commerce, the decision of the Circuit Court of Appeals is probably not in accord with the following applicable decisions of this Court:

Superior Oil Company v. *Mississippi,* 280 U. S. 390, 394, 395.

Eastern Air Trans. Inc. v. *So. Carolina Tax Commission,* 285 U. S. 147, 153.

Heisler v. *Thomas Colliery Co.,* 260 U. S. 245, 259.

D.

In holding that property which may be part of a flow of interstate commerce cannot be subject to a non-discriminatory state tax, the decision of the Circuit Court of Appeals is probably not in accord with the following applicable decisions of this Court:

Minnesota v. *Blasius,* 290 U. S. 1, 9, 10.

Bacon v. *Illinois,* 227 U. S. 504, 516.

Coe v. *Errol,* 116 U. S. 517, 528.

E.

In adjudicating that a state occupation tax measured by gross receipts from interstate commerce when fairly apportioned to the commerce carried on within the taxing state cannot be sustained, the decision of the Circuit Court of Appeals is probably not in accord with the following applicable decisions of this Court:

Western Live Stock v. *Bureau,* 303 U. S. 250, 254, 255, 256, 259.

Postal Telegraph-Cable Co. v. *Richmond,* 249 U. S. 252.

U. S. Express Co. v. *Minnesota,* 223 U. S. 335.

F.

In holding that the state of origin cannot levy a sales tax because the state of destination *may* levy a compensating or use tax, the decision of the Circuit Court of Appeals is probably not in accord with the following applicable decisions of this Court:

Southern Pacific v. *Gallagher,* 306 U. S. 167, 172.

Henneford v. *Silas Mason Co.,* 300 U. S. 577, 587.

Ohio Tax Cases, 232 U. S. 576, 593.

Wright v. *Louisville & N. R. R. Co.,* 195 U. S. 219, 222.

Kidd v. *Alabama,* 188 U. S. 730, 732.

G.

In adjudicating that a state may not levy an occupation or sales tax because interstate commerce may be or is involved as an incident to the sale, the decision of the Circuit Court of Appeals is probably not in accord with the following applicable decisions of this Court:

McGoldrick v. *Berwind-White Coal Mining Company,* 309 U. S. 33.

Graybar Electric Co. v. *Curry,* 189 Southern 186, 308 U. S. 513. (Rehearing denied, 308 U. S. 638).

Superior Oil Company v. *Mississippi,* 280 U. S. 390.

Eastern Air Trans. Inc. v. *So. Carolina Tax Commission,* 285 U. S. 147.

5.

One of the actual parties in interest is the sovereign State of Illinois and the State's revenue is involved in the case at bar.

The Petitioner in the case at bar and the Claimant in the original action is S. L. Nudelman, Director of Finance of the State of Illinois. This action was not brought by him in his individual capacity but as the chief tax enforcement official of the State of Illinois. The real party in interest is the State of Illinois and the subject matter in issue involves the State's revenue.

The Petitioner wishes to point out that the Illinois Statutes have the following provision with reference to appeals:

> "Appeals shall be taken directly to the Supreme Court * * * in all cases relating to revenue, or in which the State is interested as a party or otherwise." (1939 Illinois Revised Statutes [Bar Ass'n Ed.], Chapter 110, Par. 199; Sec. 75 of Ill. Practice Act.)

Within the jurisdiction of Illinois, practically in all instances appeals from a trial court must be taken to an intermediate appellate court. It is only in a few isolated examples such as indicated above that an appeal is directed to be taken from the trial court to the Supreme Court. Where the State is a party or where the State's revenue is involved, it is deemed of paramount importance that the issues should be determined directly by the Supreme Court so that there may be a more rapid and final adjudication.

In the case at bar, the Petitioner likewise addresses himself to the Court's discretion in praying for the issuance of a writ of certiorari so that there may be a final adjudication by the Court of last resort, to-wit: the Supreme Court of the United States.

Wherefore, the Petitioner respectfully represents that the Petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit should be granted.

.....

S. L. NUDELMAN,
Director of Finance of the State of Illinois, Petitioner.

JOHN E. CASSIDY,
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OPINIONS DELIVERED IN THE COURTS BELOW.

The majority and dissenting opinions in the United States Circuit Court of Appeals for the Seventh Circuit are set forth verbatim in the Transcript of Record filed in this cause, on pages 102-111 thereof. They are also appended to this Brief under Appendix A.

The opinion rendered in the District Court in the form of a Memorandum appears in the Transcript of Record on pages 81-84 thereof. It is likewise appended to this Brief under Appendix B hereof.

JURISDICTIONAL GROUNDS.

The jurisdiction of this Court is invoked by virtue of the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; Chapter 229, 43 Stat. 936; entitled "An Act To Amend The Judicial Code, and to further define the jurisdiction of the Circuit Court of Appeals and of the Supreme Court, and for other purposes."

The United States Circuit Court of Appeals for the Seventh Circuit on July 23, 1940, by a divided court affirmed the order or decree of the District Court of the United States, for the Northern District of Illinois, Eastern Division. (Rec. 112.) A Petition for Rehearing was filed on August 6, 1940, within the time allowed as provided

by Rule 22 of the Rules of the United States Circuit Court of Appeals, for the Seventh Circuit (Rec. 112-113); and the said Petition for Rehearing was denied on October 1, 1940. (Rec. 113.)

A certified Transcript of Record, the Petition for the issuance of a writ of certiorari herein, and the Supporting Brief annexed thereto are filed herein with the Clerk of this Court within three (3) months after denial of the said Petition for Rehearing by the United States Circuit Court of Appeals for the Seventh Circuit.

STATEMENT OF THE CASE.

The essential facts in the case at bar are fully set forth in the preceding Petition for writ of certiorari, under Point I thereof. In the interest of brevity, therefore, they are not repeated here. However, any necessary elaboration on the facts involved will be covered in the argument to follow.

SPECIFICATION OF ASSIGNED ERRORS.

The Circuit Court of Appeals for the Seventh Circuit erred:

1. In affirming the order or decree of the District Court of the United States, Northern District of Illinois, Eastern Division.

2. In determining that the transportation by a common carrier of its own property across state lines is to be deemed as being in interstate commerce.

3. In holding that an occupation tax levied in one state upon property destined to be taken to and used in another state is a direct burden on interstate commerce.

4. In holding that property which is part of a flow of interstate commerce may not be subjected to a non-discriminatory state occupation tax.

5. In holding that a state occupation tax measured by gross receipts from interstate commerce cannot be sustained even though the said gross receipts from interstate commerce are fairly apportioned to the commerce carried on within the taxing state.

6. In holding that a state cannot levy an occupation tax because the state of destination of the property involved may levy a compensating or use tax on the same sales transaction.

7. In adjudicating that a state may not levy an occupation tax because interstate commerce may be or is involved as an incident to the sale of the property against which the tax is levied.

8. In failing to reverse the order or decree of the District Court of the United States, Northern District of Illinois, Eastern Division.

SUMMARY OF THE ARGUMENT.

I. A completed contract of sale between residents of the State of Illinois is not a transaction in interstate commerce; and the Illinois Retailers' Occupation Tax is properly applicable thereto.

II. State taxes are not rendered invalid by the fact that they may indirectly or incidentally burden interstate commerce transactions.

III. The sales of the Debtor to the railroads would be subject to a non-discriminatory state tax such as the Illinois Retailers' Occupation Tax before interstate transportation of the materials sold to the railroads had commenced.

IV. The purchasing railroads, in transporting across state lines the materials purchased by them in the State of Illinois, were not engaged in interstate commerce.

V. Sales by the Debtor to purchasing railroads of materials to be subsequently used in interstate transportation were not exempted from a non-discriminatory state tax such as the Illinois Retailers' Occupation Tax.

VI. The Illinois Retailers' Occupation Tax Act, being a tax imposed upon those engaged in the occupation or business of selling tangible personal property for use or consumption within the State of Illinois, was not such a tax as might be imposed upon the seller or buyer by other states.

VII. The purchasing railroads acquired title to the materials within the State of Illinois and subsequently shipped the same for their own use across state lines in interstate transportation, but not in interstate commerce.

VIII. The fact that interstate transportation might have been involved as an incident to the sales by the Debtor to the purchasing railroads would not in itself invalidate the application of the Illinois Retailers' Occupation Tax Act to the said sales transactions.

ARGUMENT.

I.

The Illinois Retailers' Occupation Tax Act, effective July 1, 1933, is the State's chief source of revenue and has superseded the State property tax. It was first held constitutional in its entirety in *Reif* v. *Barrett,* 355 Ill. 104; and though subsequently thereto its constitutionality has been repeatedly attacked in the State Supreme Court, it has uniformly been upheld.

Commonly but improperly it is called a "sales tax." It is designated as: "An Act in relation to a tax upon persons engaged in the business of selling tangible personal property to purchasers for use or consumption." It imposes a tax upon persons engaged in the business of selling tangible personal property at retail within the State of Illinois. (1939 Illinois Revised Statutes [Bar Ass'n Ed.], Chapter 120, Par. 441.)

Section 1 of the Act defines a "sale at retail" as "any transfer of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration." (1939 Illinois Revised Statutes [Bar Ass'n Ed.], Chapter 120, Par. 440.) In defining the group or class upon which the Act operates, the Illinois Supreme Court has held that "The tax involved here is an occupation tax upon a class of vendors and is measured by the gross receipts from their sales." (*Herlihy Mid-Continent Co.* v. *Nudelman,* 367 Ill. 600, 602.)

The sum and substance of the Claimant's argument is that the transactions of sale between the Debtor and the

purchasing railroads were completed within the State of Illinois. It needs no elaborate citation of authorities to sustain the proposition that transactions of this nature are not in interstate commerce. (*Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 542. 543; *Atlantic Coast Line R. R.* v. *Standard Oil Company,* 275 U. S. 257, 267; *Banker Bros.* v. *Pennsylvania,* 222 U. S. 210, 214.)

In view of the fact that all the sales involved in the case at bar were between an Illinois corporation (the Debtor) as the seller and railroads domiciled in the State of Illinois as the buyers, the only way in which a question of interstate commerce might be raised in these transactions is dependent on whether or not the seller was obligated to and did make delivery of the merchandise to the buyer in a foreign state. The Claimant maintains that there was no such duty or obligation on the part of the Debtor as the seller. All the Debtor was required to do was to make delivery to the local (Chicago) freight station of the railroad.

The Debtor, of course, contends that it was obligated by its contract of sale to make delivery to an out-of-state shop or office of the railroad. To support this contention, the Debtor relies on the intricacies of its transaction with the railroad. There were shipping instructions, routing instructions, provisions for a bill of lading and the issuance of a waybill.

In the face of this seemingly imposing array of evidence, at first blush it might perhaps be difficult to see why this was not a *bona fide* transaction in interstate commerce. But the Debtor fails to point out or to indicate that while it, as consignor, paid no freight for the transportation of the merchandise from Chicago to Milwaukee, the consignee (the railroad) likewise neither paid any freight nor made any freight charges on its books

or records. It may well be asked, if this shipment was handled in the same manner as any other commercial shipment, *then who did pay the freight?*

It is our understanding that the railroad, as an interstate commerce carrier, carries only for hire or compensation and operates under a standard tariff rate regulated by the Interstate Commerce Commission. Is the railroad then engaging in discriminatory rate practices? Is it applying the standard tariff rate to most shipments, while in the case at bar no charges were made for the transportation of merchandise?

However, no one appreciates any better than the railroad that it was not engaged in discriminatory rate practices. As was set forth in a short, pithy statement by the Debtor's own witness, B. B. Melgaard, the assistant purchasing agent at the Chicago office of the railroad: "That is right. We carry *our* material to our shops at Milwaukee." (Italics ours; Rec. 47.)

It is thus clearly apparent that the railroad did not function as two distinct entities—one as the buyer and the other as the carrier. The railroad acquired title and possession in Chicago, Illinois, and transported the merchandise to Milwaukee, Wisconsin, not as a common carrier for hire, *but as a buyer that happens to have the implements of carriage and employs them to transport its own property from one State to another.*

The tax in question was not levied against the railroad engaged in transporting its own property into a foreign state, but on the gross receipts realized by the Debtor on a contract of sale consummated between itself and the railroad within the State of Illinois. The movement of the property into a foreign state by the buyer's own facilities was no essential part of the sales transaction. As

this Court held in *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 259:

> "* * * a tax upon articles in one State that are destined for use in another State cannot be called a regulation of interstate commerce * * *."

It is therefore respectfully submitted that the tax in question is based purely on the seller's receipts from intra-state sales and does not conflict with the Commerce Clause of the Federal Constitution.

II.

State taxes that indirectly may burden interstate commerce are not necessarily invalid by virtue thereof. The underlying principle involved was concisely stated by this Court in *Superior Oil Company* v. *Mississippi*, 280 U. S. 390, on page 395:

> "The importance of the commerce clause to the Union, of course, is very great. *But it also is important to prevent that clause being used to deprive the States of their lifeblood by a strained interpretation of facts.*" (Italics ours.)

In *Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169, the Wiloil Corporation, a Pennsylvania corporation. contracted to sell liquid fuel to a Pennsylvania purchaser. The fuel was obtained from Delaware and shipped in from Delaware to the purchaser in Philadelphia. This Court in upholding the state tax on the transaction, said on page 175:

> "As interstate transportation was not required or contemplated, it may be deemed as merely incidental. Cf. *Moore* v. *N. Y. Cotton Exchange*, 270 U. S. 593, 604. *Ware & Leland* v. *Mobile County*, 209 U. S. 405, 412-413. The Act lays no burden on interstate commerce as such, and if any can be said to

result from the imposition, *it is indirect and precisely as that which would have resulted if deliveries had been made exclusively by intra-state transportation from Pennsylvania sources.*" (Italics ours.)

In *Nashville, C. & St. L. Ry.* v. *Wallace,* 288 U. S. 249, this Court said on page 267 of its opinion:

"* * * But interstate rail carriers are not wholly immune from other forms of non-discriminatory state taxation, *even though the burden of the tax is thus indirectly or incidentally imposed upon the interstate commerce in which they are engaged.*" (Italics ours.)

Without further citations of authority, it may be conclusively stated that it is and has been the uniform policy of the Federal Courts to uphold state taxes though they may indirectly or incidentally burden interstate commerce.

III.

This Court has repeatedly affirmed the principle that where property acquires a situs within a state, either before interstate transportation has commenced or due to a break in the interstate transit, it becomes subject to the state's taxing power.

One of the earlier leading cases in which this principle became established is *Coe* v. *Errol,* 116 U. S. 517. The question therein was whether the products of a state, though intended for exportation to another state and deposited at a place of shipment for that purpose, might be taxed like other property within the state. This Court sustained the state tax, saying on page 528:

"It is true, it was said in the case of *The Daniel Ball,* 10 Wall, 557, 565: 'Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the

> States has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from the one State to the other. *The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey.* That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation." (Italics ours.)

Another case in point is *Bacon* v. *Illinois,* 227 U. S. 504. The facts indicated that a certain quantity of grain was being shipped from southern and western states to eastern states. During the process of transportation, the grain was removed from its cars in Chicago for the purpose of inspecting, grading and mixing it. The question was whether or not this grain was subject to a state property tax, due to the fact that there had been a break in transit during the interstate transportation. This Court held that the grain was so subject to a state property tax, saying on page 516:

> "He intended to forward the grain after it had been inspected, graded, etc., but this intention, while the grain remained in his keeping and before it had been actually committed to the carriers for transportation, did not make it immune from local taxation. He had established a local facility in Chicago for his own benefit and while, through its employment, the grain was there at rest, *there was no reason why it should not be included with his other property within the State in an assessment for taxation which was made in the usual way without discrimination.*" (Italics ours.)

One of the more recent cases on the subject is *Minnesota* v. *Blasius,* 290 U. S. 1. Certain cattle that had come in from outside the state were purchased by Blasius at St. Paul, Minnesota. The purchase was made on April 30, 1929, and the next day a property tax was assessed

against him for the value of the cattle. Within a few days thereafter the cattle were sold to non-resident purchasers and shipped out of the state. Here again this Court upheld the validity of the state tax, saying on page 10:

> "Where property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the State, or for shipment elsewhere, as his interest dictates, *it is deemed to be a part of the general mass of property within the State and is thus subject to its taxing power.*" (Italics ours.)

We have cited these cases to indicate the extent to which this Court has gone to uphold the validity of state taxes, though the property subject to the tax is on the verge of being put into interstate transportation or has acquired a situs within a state due to a break in its interstate transportation.

IV.

Bearing on the issues involved in the case at bar, the question arises as to the type of transportation involved where a carrier moves its own property across state lines for its own use. Is this to be classed or considered as interstate commerce? Probably the most approved discussion of the subject is contained in *The Pipe Line Cases*, 234 U. S. 548.

It appeared therein that a group of companies, controlling pipe lines running between California and the Eastern Seaboard, had acquired a virtual monopoly on the transportation of oil through this means of conveyance. They used their monopoly to force the sale to them of all oil carried through their pipe lines. As the Court said: "They carry everybody's oil to a market although

they compel outsiders to sell it before taking it into their pipes." On page 560 of its opinion this Court said:

> "That the transportation is commerce among the states we think clear. That conception cannot be made wholly dependent upon technical questions of title, and the fact that the oils transported belonged to the owner of the pipe line is not conclusive against the transportation being such commerce. * * * *The situation that we have described would make it illusory to deny the title of commerce to such transportation, beginning in purchase and ending in sale, for the same reasons that make it transportation within the Act.*" (Italics ours.)

We deem it important to observe the Court's language in indicating why this transportation was commerce among the states i. e., *because it began in purchase and ended in sale.* The oil companies were purchasing oil along the routes of their pipe lines, transporting the oil to eastern markets *and then selling the same.* This as the Court set forth is unquestionably transportation in interstate commerce. But we may digress to point out that in the case at bar the railroads were not making purchases for the purpose of selling the materials after the interstate transportation had ended. The railroads were making these purchases to use the materials for their own specific needs.

It is most interesting to note that in the Pipe Line Cases the Court held one of the companies, the Uncle Sam Oil Company, was not engaged in interstate commerce. We are quoting from pages 561 and 562 of the Court's opinion:

> "There remains to be considered only the Uncle Sam Oil Company. This company has a refinery in Kansas and oil wells in Oklahoma, with a pipe line connecting the two which it has used for the sole purpose of conducting oil from its own wells to its own refinery. It would be a perversion of language, considering the sense in which it is used in the Statute, to say that a

> man was engaged in the transportation of water whenever he pumped a pail of water from his well to his house. So as to oil. When, as in this case, a company is simply drawing oil from its own wells across a state line to its own refinery for its own use, and that is all, we do not regard it as falling within the description of the Act, *the transportation being merely an incident to use at the end.*" (Italics ours.)

Here then is a well defined distinction between the other oil companies involved and the Uncle Sam Oil Company. In one instance the oil companies were buying oil, transporting it across state lines and selling it at the point of final destination. But the Uncle Sam Oil Company, merely being engaged in transporting its own oil from its oil wells in Oklahoma to its refinery in Kansas, was not making such transportation in interstate commerce. By analogy with the case at bar, the railroads, in transporting the merchandise purchased from the Debtor in Chicago to their shops or offices out of the state, were not making such transportation in interstate commerce.

Another case in point is *Pennsylvania Railroad Company* v. *Public Utilities Commission of Ohio*, 298 U. S. 170. This involved a construction of the United States Commerce Act which as the Court said, "Is aimed at common carriers exclusively and not even at all these." It appeared that coal mined in Pennsylvania was carried by the owner's private facilities to its plant in Ohio where it was cleaned, broken and sorted, and from there shipped by rail to the owner's customers in Ohio. The owner contended that the transportation from Pennsylvania to Ohio was in interstate commerce. But the Court held differently, saying on page 175:

> "The transportation between Pennsylvania and Ohio was by the owner, who was not a common carrier, but furnished implements of carriage for its own use exclusively. Appellants would have us hold

> that this interstate transportation by an owner who does not carry for any one else will be tacked to the intra-state transportation by railroads who are in business as common carriers, and the movement thus consolidated brought within the statute. The statute and the decisions as we read them forbid this unifying process. *The Pipe Line Cases,* 234 U. S. 548, 562; *McCluskey* v. *Marysville & Northern Ry. Co.,* 243 U. S. 36, 39, 40; *Atlantic Coast Line R. Co.* v. *Standard Oil Co.,* 275 U. S. 257; *Campbell River Mills Co.* v. *Chicago, M., St. P. & P. R. Co.,* 42F (2d) 775, 777, 778; aff'd, 53F. (2d) 69, 72, 73; *Pennsylvania R. Co.* v. *McGirr's Sons Co.,* 287 Fed. 334."

The Court thus negatived the contention that where a carrier transports its own property across state lines, such transportation may be deemed as being in interstate commerce.

In *Superior Oil Company* v. *Mississippi,* 280 U. S. 390, the facts indicated that the Oil Company, a Mississippi corporation, sold gasoline to packers within the state and delivered it at the packers' wharves. The packers loaded the fuel on their own boats and sent it to Louisiana where it was delivered to fishermen for use in fishing. The fishermen brought their catch back to Mississippi, sold it to the packers and were charged with the cost of the fuel. The Oil Company received from the packers a bill of lading signed by the Master of the Boat on which the fuel was loaded and reading in part: "Consigned to Gussie Fountaine Pkg. Company. Destination: Grant's Pass, Louisiana."

In deciding that the State of Mississippi could assess a tax against the Superior Oil Company on the fuel so sold, the Court said on page 394:

> "The seller, of course, paid no freight. The document seems to have had no other use then, as the Supreme Court of Mississippi said, to try to convert

a domestic transaction into one of interstate commerce. There was no consignee at the point of destination. *The goods were delivered to the so-called consignee before they started, and were in its hands throughout.*" (Italics ours.)

Reading further, the Court held on page 395:

"* * * *But here the gasoline was in the hands of the purchaser to do with it as it liked*, and there was nothing that in any way committed it to sending the oil to Louisiana except its own wishes. * * * The only purpose of the vendor here was to escape taxation. It was not taxed in Louisiana and hoped not to be in Mississippi." (Italics ours.)

Unquestionably there is an analogy between these cases and the case at bar. In each instance the carriers received the property from the seller within the state and then transported it across state lines for their own use. Such transportation cannot be deemed as being in interstate commerce.

V.

We may inquire into the effect of state taxation on property that is either purchased or stored within a state for use by a carrier in interstate transportation. An example of this is the case of *Eastern Air Trans. Inc.* v. *South Carolina Tax Commission*, 285 U. S. 147. The Transport Company, a Delaware corporation, operated airplanes in interstate commerce across the state of South Carolina. Its entire business was interstate in character and it purchased gasoline in South Carolina for its planes. The seller added to the price of the gasoline sold to the Transport Company the amount of the state gasoline tax. The Transport Company contended that this gasoline tax placed a direct burden on interstate commerce and was

therefore repugnant to the Commerce Clause of the Federal Constitution. This Court refused to sustain this contention, saying on page 153 of its opinion:

> "*But the mere purchase of supplies or equipment for use in conducting a business which constitutes interstate commerce is not so identified with that commerce as to make the sale immune from a nondiscriminatory tax imposed by the state upon intrastate dealers.* There is no substantial distinction between the sale of gasoline that is used in an airplane in interstate transportation and the sale of coal for the locomotives of an interstate carrier, or of the locomotives and cars themselves bought as equipment for interstate transportation. A nondiscriminatory tax upon local sales in such cases has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected." (Italics ours.)

Along the same line is the case of *Edelman* v. *Boeing Air Trans. Inc.*, 289 U. S. 249. Therein the Transport Company, also engaged in interstate commerce, was taxed by the state on gasoline withdrawn from its storage tanks and placed in its planes. No tax was collected for the gasoline consumed in the Transport Company's planes, but it was only at the time that the gasoline was withdrawn from storage for use that the tax was applied. Here again the Supreme Court upheld the validity of the state tax, saying in its opinion on page 252:

> "A state may validly tax the 'use' to which gasoline is put in withdrawing it from storage within the state, and placing it in the tanks of the planes, *notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce.* Such a tax cannot be distinguished from that considered and upheld in *Nashville, Chattanooga &*

St. Louis Ry. v. *Wallace,* 288 U. S. 249." (Italics ours.)

We may also again cite *Nashville, Chattanooga and St. L. Ry.* v. *Wallace,* 288 U. S. 249. The facts therein indicated that the Railroad, an interstate carrier, purchased gasoline outside of the State of Tennessee, but which was stored in the railroad's storage tanks within the State of Tennessee. None of the gasoline was sold but it was all withdrawn and used by the railroad to furnish motor power for its interstate operations. The railroad contended that the state tax imposed "on persons and corporations engaged in or carrying on the business of selling, or storing, or distributing gasoline" infringed on and interfered with the railroad's interstate transportation, and was therefor a burden on interstate commerce. But the Supreme Court refused to sustain this contention, saying on page 267:

> "We cannot say that the tax is a forbidden burden on interstate commerce because Appellant uses the gasoline, subsequent to the incidence of the tax as an instrument of interstate commerce."

These cases go beyond the principle propounded in the Pipe Lines Cases. They hold conclusively that there is nothing repugnant to the Commerce Clause of the Federal Constitution in a state tax on the purchase or storage of supplies used by a carrier in interstate transportation.

Here then is another line of cases analogous to the one at bar. The railroads, after acquiring the property from the Debtor, may subsequently use this merchandise in interstate *transportation,* but that does not make it interstate commerce. As the Court said in *Pennsylvania Railroad Co.* v. *Public Utilities Commission of Ohio,* 289 U. S. 170, on pages 173, 174:

"Appellants say that from the moment the coal

left the mines in Pennsylvania there was a continuing intention to deliver it to consumers in another state, whether their identity at the beginning was known or unknown, and that a movement impelled by that intention is interstate commerce which Congress has the power to regulate at any state of ensuing transit. *Baltimore & Ohio S. W. R. Co.* v. *Settle,* 260 U. S. 166, 173; *Ohio Railroad Comm'n* v. *Worthington,* 255 U. S. 101, 108; *Federal Trade Comm'n* v. *Pacific States Paper Ass'n,* 273 U. S. 52, 64. *But there is confusion of thought in such a statement of the problem. Not all commerce is transportation,* and not all transportation is by common carriers by rail." (Italics ours.)

In the case at bar the subsequent use of the property by the railroads in interstate transportation cannot by any means be considered as being in interstate commerce.

VI.

Up to this point we have discussed the question from the point of view that state taxation is invalid if it directly burdens interstate commerce. But even this principle is not rigid, but on the contrary is subject to qualification. As this Court point out, "Even interstate business must pay its way." (*Postal Telegraph-Cable Co.* v. *Richmond,* 249 U. S. 252.)

In *Western Live Stock* v. *Bureau,* 303 U. S. 250, the Court said on page 254:

> "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business. * * * *and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business.*" (Italics ours.)

In the same case the Court stated on pages 255, 256:

> "The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed * * * with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce."

Continuing on page 256, the Court said:

> "Taxation measured by gross receipts from interstate commerce has been sustained when fairly apportioned to the commerce carried on within the taxing state, *Wisconsin & M. Ry. Co.* v. *Powers,* 191 U. S. 379; *Maine* v. *Grand Trunk Ry. Co., supra; Cudahy Packing Co.* v. *Minnesota, supra; United States Express Co.* v. *Minnesota,* 223 U. S. 335, and in other cases has been rejected only because the apportionment was found to be inadequate or unfair."

The above case, *Western Live Stock* v. *Bureau,* 303 U. S. 250, was concerned with the question of whether or not a state privilege tax, measured by the gross receipts received from the sale of advertising space by those engaged in the business of publishing newspapers or magazines, imposed an unconstitutional burden on interstate commerce where the publication was circulated to subscribers within and without the state. The Court sustained the state tax, saying on page 259 of its opinion:

> "Here it is perhaps enough that the privilege taxed is of a type which has been regarded as so separate and distinct from interstate transportation as to admit of different treatment for purposes of taxation, *Utah Light & Power Co.* v. *Pfost, supra; Federal Compress & W. Co.* v. *McLean, supra; Chassaniol* v. *Greenwood,* 291 U. S. 584, and that the value of

> the privilege is fairly measured by the receipts. The tax is not invalid because the value is enhanced by appellant's circulation of their journal interstate any more than property taxes on railroads are invalid because property value is increased by the circumstance that the railroads do an interstate business."

The Court's opinion in the Western Live Stock case above is predicated to a degree on *American Manufacturing Company* v. *St. Louis,* 250 U. S. 459. Therein the City of St. Louis had levied against manufacturers a license tax as a condition to conducting a manufacturing business in the City, but the tax was based on the amount of sales of the manufactured goods whether sold within the state or without the state. The manufacturer contended that the tax was void as being a direct burden on interstate commerce. The Supreme Court upheld the validity of the tax saying on page 464 of its opinion:

> "In our opinion, the operation and effect of the taxing ordinance are to impose a legitimate burden upon the business of carrying on the manufacture of goods in the city; it produces no direct burden on commerce in the goods manufactured, whether domestic or interstate, and only the same kind of incidental and indirect effect as that which results from the payment of property taxes or any other and general contribution to the cost of government. Therefore, it does not amount to a regulation of interstate commerce."

It may be argued and the Circuit Court of Appeals has made a finding that because the state of destination such as Wisconsin, could levy a compensating or use tax, therefor the state of origin, Illinois, could not levy an occupation or sales tax on these sale transactions. This is the "multiple taxation doctrine" over again. It may first be noted that since the Illinois tax is levied against the *seller* and not the buyer, the levy of a use tax by

the State of destination against the buyer would subject the buyer to only a *single* tax on the transaction. Double or multiple taxation does not exist unless the same tax is levied on the same subject matter within the same jurisdiction. (*Ohio Tax Cases,* 232 U. S. 576, at page 593; *Wright* v. *Louisville and Nashville R. R. Co.,* 195 U. S. 219, at page 222; *Kidd* v. *Alabama,* 188 U. S. 730 at page 732.)

But we are not answering this contention solely on that basis. The question of the "multiple taxation doctrine" is not before the Court in the case at bar. The best answer to this argument was given by Mr. Justice Cardozo in *Henneford* v. *Silas Mason Co.,* 300 U. S. 577, 587:

> "A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere. If there are limits to that power, there is no need to make them now. *It will be time enough to make them when a taxpayer paying in the state of origin is compelled to pay again in the state of destination.*" (Italics ours.)

This was quoted with approval in *Southern Pacific* v. *Gallagher,* 306 U. S. 167, 172:

> "Under the Washington statute, there considered, discrimination against interstate commerce, arising from a second exaction for use after a foreign tax on sale, could not exist as provision was made for a credit against the local tax of any such foreign levy. No such problem arises here by evidence, finding or assignment or error even though the California Act does not have this provision. *It will be time enough to resolve that argument 'when a taxpayer paying in the state of origin is compelled to pay again in the state of destination.'*" (Italics ours.)

Consequently the Court need not consider the possibilities that may arise should the state of destination,

such as Wisconsin, impose a use tax on the sales in question.

VII.

The Debtor had made sales of tangible personal property to railroads for use or consumption. In pursuance to the contracts of sale, the Debtor had made delivery of the property to the railroads at their respective Chicago freight stations. It is a fundamental principle of law that the delivery of merchandise by the seller to a common carrier for transportation to the buyer is a sufficient delivery to the buyer to pass title to him. (*Golo Slipper Co.* v. *Hamilton Shoe Stores Co.*, 43 F. (2d) 33, 34; *United States* v. *Hecht*, 11 F. (2d) 128, 135; *In re Arctic Stores*, 258 Fed. 688, 690; *City of Carthage* v. *Duvall*, 202 Ill. 234, 237.)

It is another fundamental principle of law that under a contract of sale f. o. b. the point of shipment, title passes to the buyer at the time of delivery to the carrier. (*Nelson Bros.* v. *Perryman-Burns*, 48 F. (2d) 99, 100; *Higgins* v. *California Prune Growers*, 16 F. (2d) 190, 192; *Hoffman* v. *Gosline*, 172 Fed. 113, 117; *Price* v. *Neiman Bros. Co.*, 240 Ill. App. 157, 162.)

All the contracts entered into between the Debtor and the railroads were f. o. b. Chicago. It is therefore self-evident that title in the property passed to the railroads upon delivery to them at Chicago within the State of Illinois. *In subsequently transporting the property across State lines, the railroads were simply engaged in carrying their own property for their own use.* This transportation was definitely not in interstate commerce. (*Penn. R. R. Co.* v. *Public Utilities Commission*, 298 U. S. 170, 173, 174; *Eastern Air Trans., Inc.* v. *So. Carolina Tax Commission*, 285 U. S. 147, 152; *Superior Oil Company* v.

Mississippi, 280 U. S. 390, 395; *The Pipe Line Cases,* 234 U. S. 548, 561, 562.)

It is not to be denied that these principles of law as to when title passes will not apply where it appears that there was a different intention between the parties. Nor can it be denied that the orders from the railroads to the Debtor and the bills of lading received by the Debtor indicated that in each instance the materials were to be shipped out of the state. *But the form of a document cannot convert an intra-state transaction into an interstate one.* In *Superior Oil Company* v. *Mississippi,* 280 U. S. 390, on pages 394 and 395, the Court said:

> "The document (bill of lading) can hardly affect the case, because it is 'not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to State control, into an interstate commerce business protected by the commerce clause.'" (*Browning* v. *Waycross,* 233 U. S. 16, 23.)

All that the Debtor was required to do was to deliver the materials to the Chicago freight stations of the railroads. *The Debtor was not required to, nor did it make delivery of the merchandise across the State lines.* The Debtor paid no freight, nor does it appear that the railroads set up any freight charges on their books or records for these shipments.

There is no dispute concerning the railroad's position in these transactions. As the Debtor's witness, B. B. Melgaard, the Assistant to the Chicago Purchasing Agent for one of the railroads, testified: "We carry our materials to our shops in Milwaukee." (Rec. 47.) In other words, upon delivery of the materials to its Chicago freight station *the railroad acquired title and then shipped its own materials across the State lines* to its shops in

Milwaukee for its own use. While this might be considered interstate transportation, it is not and cannot be confused as being interstate commerce.

VIII.

In its two most recent decisions this Court has sustained the principle that a state tax upon a local activity, such as the selling of merchandise, is to be sustained even though interstate commerce may be involved incidentally to the sales transactions.

The first of these is *Graybar Electric Co.* v. *Curry*, 189 So. 186, 308 U. S. 513. Therein the State of Alabama had levied a sales tax upon the privilege of engaging in the business of selling tangible personal property within the State. A part of the facts indicated that the Electric Company had entered into contracts of sale expressly requiring that certain merchandise should be shipped into Alabama from the State of Ohio in interstate movement. In pursuance to said contracts of sale the Electric Company did cause this merchandise to be shipped into Alabama from the State of Ohio in interstate movement. The question was whether transactions of this type were exempted from the operation of the state sales tax on the ground that they were in interstate commerce.

The Supreme Court of Alabama sustained the state tax on these transactions, saying in its opinion on pages 190, 191:

> "It was no benefit to the purchasers that the goods were to be shipped 'in interstate movement' for the reason that the price of the goods would be the same, whether shipped 'in interstate movement' or not. Evidently this provision as to 'interstate movement' was to preclude, if possible, the imposition of a sales tax on the goods in Alabama. The transactions were

Alabama sales within the provision of the Alabama Sales Tax Law. The form or language of the customers' orders cannot affect the case.

"It is not 'within the power of the parties, by the form of their contract, to convert what was exclusively a local business, subject to state control, into an interstate commerce business protected by the commerce clause.' *Superior Oil Co.* v. *State of Mississippi ex rel. Rush H. Knox, Attorney General*, 280 U. S. 390-396; *Browning* v. *Waycross*, 233 U. S. 16, 23, 58 L. ed. 828-832, 34 S. Ct. Rep. 578."

A Petition for writ of certiorari was filed in this Court; and on November 6, 1939, on a motion to affirm, the judgment of the Supreme Court of Alabama was affirmed by this Court on the authority of *Banker Bros.* v. *Pennsylvania*, 222 U. S. 210, and *Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169.

In *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, the question involved was whether the sales tax of New York City was applicable to certain sale transactions of the respondent, Berwind-White Coal Mining Co. The contract between the buyer and seller required that the coal move in interstate shipment from Pennsylvania to the City of New York; and the coal actually was shipped in such interstate transportation. Yet this Court sustained the New York City sales tax act on these particular sale transactions. The Court's opinion is so relevant in all particulars to the issues involved in the case at bar that it would be futile to even attempt to quote any of its pertinent references. We believe, however, that one of the paragraphs towards the conclusion of the opinion is so fully in point that it is set forth here verbatim:

"The rationale of the *Adams Manufacturing Co.* case does not call for condemnation of the present tax. Here the tax is conditioned upon a local activity, delivery of goods within the state upon their purchase

for consumption. It is an activity which apart from its effect on the commerce, is subject to the state taxing power. The effect of the tax, even though measured by the sales price, as has been shown, neither discriminates against nor obstructs interstate commerce more than numerous other state taxes which have repeatedly been sustained as involving no prohibited regulation of interstate commerce."

CONCLUSION.

It is respectfully submitted that the case at bar involves the right of the State of Illinois to levy a non-discriminatory state occupation tax against the seller, based on the seller's gross receipts on transactions of sale between residents of Illinois consummated by delivery to the buyers within Illinois. This never has been and cannot be construed as interstate commerce and the state tax is properly applicable thereto.

Wherefore, the Petitioner respectfully submits that the decree of the United States Circuit Court of Appeals for the Seventh Circuit, affirming the order or decree of the United States District Court for the Northern District of Illinois, Eastern Division, should be reversed.

JOHN E. CASSIDY,
Attorney General of the State of Illinois.

MONTGOMERY S. WINNING,
EDWIN T. BREEN,
ELI J. BIBO,
PHILIP J. SIMON,
Assistant Attorneys General of the State of Illinois, of Counsel,
Attorneys for Petitioner.

APPENDIX A.

OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MAJORITY OPINION
DISSENTING OPINION

No. 7082

OCTOBER TERM, 1939, APRIL SESSION, 1940

In the Matter of
GLOBE VARNISH COMPANY,
A Corporation,
Debtor.

S. L. NUDELMAN, Director of Finance of the State of Illinois,
Claimant-Appellant,

vs.

GLOBE VARNISH COMPANY,
A Corporation,
Debtor-Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

JULY 23, 1940

Before SPARKS and MAJOR, *Circuit Judges*, and LINDLEY, *District Judge*.

SPARKS, *Circuit Judge*. The Globe Varnish Company is in reorganization proceedings under section 77B of the

Bankruptcy Act. Appellant, the Director of Finance of Illinois, filed a claim in the sum of $1,594.87 for taxes alleged to be due under the Illinois Retailers' Occupation Act. 1937 Illinois Revised Statutes, chapter 120, §§440 *et seq.*, pertinent parts of which we set forth in the margin.[1]

The debtor filed objections to the claim. It was referred to the referee as special master, and after a hearing he allowed the claim in full and so reported. Upon hearing before the District Court it disallowed a portion of the claim in the sum of $560.57, holding that that amount represented taxes on sales in interstate commerce. From that order this appeal is prosecuted.

The facts are not disputed. The debtor was engaged in selling tangible personal property for use or consumption. It is an Illinois corporation with its main place of business in Chicago. The railroad companies to whom the sales in question were made had offices and freight stations in that city. The transactions of sale were all similar, and Exhibit 1, which is an order for paint, is typical. That exhibit was a written order placed by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (hereafter referred to as the Railroad) with the debtor for nine drums black locomotive finishing paint, in 55 gallon, one-time containers, at $1.10 per gallon, f. o. b. Chicago. The

1. § 440, ¶ 1. "'Sale at retail' means any transfer of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration. Transactions whereby the possession of the property is transferred but the seller retains the title as security for payment of the selling price shall be deemed to be sales."

§ 441. "A tax is imposed upon persons engaged in the business of selling tangible personal property at retail in this State at the rate of two per cent (2%) of the gross receipts from such sales in this State of tangible personal property made in the course of such business upon and after the taking effect of this Act and prior to July 1, 1935, and at the rate of three per cent (3%) of the gross receipts from such sales on and after July 1, 1935. * * * However, such tax is not imposed upon the privilege of engaging in any business in interstate commerce * * *."

order requested the debtor to ship the order to the Railroad, care of storekeeper (consignee) 1029-183, (Destination) Milwaukee Shops, Wisconsin, via the Railroad, junction nearest point of shipment, unless otherwise specified. The routing instructions contained the following: "Deliver to C. M. St. P. & P. R. R. Freight Station." The order further stated that the receipted bill of lading must accompany the invoice and be sent to the purchasing agent, and that the seller should strictly comply with all instructions and specifications.

The debtor complied with the order in all respects and delivered the paint properly consigned to the consignee at Milwaukee, to the freight station of the railroad named, together with a standard form of bill of lading prescribed by the Interstate Commerce Commission. It was receipted by the freight agent, and a copy given to the debtor, and the shipment was handled precisely as it would have been handled had the consignee been a purchaser other than the Railroad, that is to say, a way bill was issued in accordance with the bill of lading, the paint was placed in the car and transported directly to the destination at Milwaukee, Wisconsin. This method of sale and delivery had been pursued by the parties in precisely the same manner for twenty-four years.

We agree with appellant that state taxes which may indirectly burden interstate commerce have been upheld. *Nashville Ry.* v. *Wallace*, 288 U. S. 249, and analogous cases. It also has been held that where a carrier purchases supplies for its subsequent use in interstate commerce, neither the purchase nor the storage is exempted from a non-discriminatory state tax, because the interim between the delivery and the subsequent shipment by the purchaser in interstate commerce gives the property a taxable situs in the state where stored. *Edelman* v. *Boeing*

Air Transport Co., 289 U. S. 249. See also *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, and cases there cited. In other words, during the interim of rest, the stream of interstate commerce had ceased, or had not begun. In the McGoldrick case, it was also held that, although the purchase was a transaction in interstate commerce, the tax was a valid exercise of state power, because it was laid alike upon interstate and intrastate sales, and there was no discrimination.

Was the transaction in interstate commerce? We think it was, just as clearly, if not more so, than in the case of *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434. The facts are stipulated that the paint was purchased in Illinois, under instructions from the buyer for the seller to consign it to Milwaukee, Wisconsin, deliver it to a freight station of a specified railroad in Chicago, secure a receipted bill of lading, and deliver the receipted bill to the buyer's purchasing agent. These instructions were fully complied with, and the transportation was continuous from the time the paint left the seller's place of business until it reached its destination in Milwaukee.

Appellant contends, or rather intimates, that the transportation in interstate commerce did not begin, if at all, until the property was delivered by the seller to the freight agent at Chicago. If this principle is adopted, the seller in the business described in the statute, and those similarly situated, could never engage in interstate commerce, and the exception in the statute is a useless provision. We think there is no merit in this contention.

Appellant further contends that, in as much as title had passed to the Railroad in Illinois, subsequent transportation thereof outside the State by the Railroad was not in interstate commerce.

It is quite true, as a general rule, that title to property passes to a vendee when it is delivered by a vendor to a carrier f. o. b. The rule applies, however, only where there is an absence of a different intention, for it has always been recognized, by courts and legislatures, that where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. *United States* v. *Hecht*, 11 F. 2d 128. In the instant case, we think it makes no difference when the title passed, and we are unable to perceive how that fact, whenever it occurred, could be determinative of the character of the sale, as to whether it was an interstate or an intrastate transaction. The fact that the buyer at the time of the purchase might pay the shipping charges to the seller, or might direct the seller to ship it f. o. b. at place of shipment would not, it seems to us, alter the character of the transaction in the least. Under such circumstances the title would pass precisely the same as it did in the instant case, and to no greater extent. In each case there was and would be a lack of delivery of possession.

It is contended, however, by appellant that there was a delivery of possession to the buyer at the freight station in Illinois, and that at all times thereafter the buyer had complete possession, domination and control of the property. This we think is an erroneous conclusion, arising from the fact that the buyer in this case was also the public carrier, and of course, was acting in a dual capacity. The decisions which we have hereinbefore cited recognize this dual capacity, and, in the absence of fraud, approve of its application. It is no longer debatable that a public carrier in carrying its own property is governed by the same rules which control the transportation of other property except as to charges.

Hence, the delivery of this property at the freight station in Chicago was not made to the buyer, but to the carrier. The buyer had no possession of it or right to possession of it, until it arrived at Milwaukee. That this was the clear intention of the parties can not be doubted. They thought they were engaged in an interstate transaction which was not subject to the Occupation Tax of Illinois. They knew that if the paint were sold and delivered to the buyer in Illinois, and stored or held by it for any length of time in Illinois for its future use beyond state lines, the occupational tax of Illinois would be collectible, because under such circumstances the stream of interstate commerce would not yet have started. Under such circumstances the railroad might have been liable for many different taxes, discussed in the various decisions, upon this property held in storage or otherwise. It is not a fair statement of the record to say that both parties knew that the railroad intended, after receiving the purchased wares, to transport them to points outside the state. The most that can be said is that both parties intended that the seller should consign the paint to Milwaukee via the buyer's railroad. The record discloses the reasons for this intention to be: (1) Not a drop of the paint was to be used in Illinois, it was all to be used in Milwaukee; (2) it was desired to avoid any delivery of possession to the buyer in Illinois, thus avoiding a reshipment or a reconsignment by the buyer, which might brand the transaction as an intrastate one and rightfully subject the seller to the Illinois Occupation Tax.

The considerations for the agreement to carry out these intentions were obvious and are in the record. If it was an intrastate transaction, the tax was due from the seller, and it was authorized to pass it on to the buyer and would have done so. Hence when the buyer ordered the paint

to be consigned and shipped to Milwaukee, the only place where it was needed or could be used by the buyer, the latter was relieved from paying the tax, upon the condition that possession of the property would be withheld from the buyer until it reached Milwaukee. It is not claimed that fraud or bad faith permeated any part of this transaction, although it was intimated in argument that the transaction and its results were preconceived, and planned by the parties. To do so would not be unlawful, for every voluntary act is the product of a thought. However, such planning, if any may be inferred, certainly occurred long before the enactment of the Illinois Act, for this transaction was merely a repetition of what these same parties had been doing for a quarter of a century.

Moreover, complete title presupposes free use, control and possession by the owner or his agent, hence the Railroad's title to this property was not untrammeled as between it and the seller until the delivery was made in Milwaukee. Its obligation to deliver according to the consignment was as binding on it as it would have been on any other carrier, and the seller as against the buyer had a right to rely upon its strict performance, for it was this that was determinative of its right to exemption from the tax. If the obligation had been violated by the Railroad, and the paint had remained in Illinois, the seller's remedy perhaps would not have been by way of defense to the State's claim, but by action against the Railroad, for the violation of its contract. That phase of the case, however, is moot, for delivery was made according to the consignment. It is mentioned only as bearing upon the Railroad's right of complete use, control and possession of the property before delivery at Milwaukee, which we think it did not have.

It is further contended by appellant that state taxation

directly placed on interstate commerce is not of itself invalid, unless it is capable of being imposed by every state through which the shipment passes. This may be true. However, as Wisconsin has the right to levy a compensating use tax on property such as here involved, Illinois, aside from the exemption, cannot validly levy a privilege tax measured by the proceeds of the sale, as this would result in two taxes upon an interstate sale, while a local sale would be subject to only one. See *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167; *J. D. Adams Mfg. Co.* v. *Storen,* 304 U. S. 307; *Western Live Stock* v. *Bureau of Revenue, supra.* See also *McGoldrick* v. *Berwind-White Co., supra.*

Appellant further contends that where a carrier transports its own materials or property across state lines for its own use, it is not interstate commerce. We think the contrary is true under the facts here presented. See *The Pipe Line Cases,* 234 U. S. 548; *Valvoline Oil Co.* v. *United States,* 308 U. S. 141. See also *Wood Preserving Corp.* v. *Dep't of Treasury,* decided by us this term.

It is further contended by appellant that the carrying of goods in carts, trucks or other vehicles to the depot where the journey is to commence is not part of interstate commerce. It relies on *Coe* v. *Errol,* 116 U. S. 517, and analogous cases. In those cases the seller made no consignment beyond state lines. The goods were delivered to the buyer and held in possession by it for its future use if, when, and where it might require. It is clear that those facts are not analogous to those here.

Decree.

AFFIRMED.

LINDLEY, *District Judge*, Dissenting.

I am of the opinion that the taxes were legally assessed. The debtor, engaged in selling merchandise in Illinois, with its chief place of business in the City of Chicago, from time to time, sold to the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, having offices and freight stations in Chicago, certain manufactured materials, each order emanating from an Illinois office of the railroad company. In each instance the railroad company delivered to the debtor an order for merchandise to be delivered f.o.b. Chicago, at the local freight station of the railroad, consigned to one of the latter's out of state shops. The debtor, accepting the orders, delivered the materials to the freight station in Chicago and received bills of lading acknowledging receipt of the material for shipment outside of the state. The railroad then transported the merchandise to its out of state office to which it was consigned. An employee of the railroad company testified, "we carry our material to our shops at Milwaukee."

The Illinois Retailers Act imposes a privilege tax upon persons engaged in the selling of tangible personal property for use and consumption, the amount of the tax being determined by the volume of sales. The act expressly provides that it shall not apply to the privilege of engaging in business in interstate commerce. Chapter 120 Illinois Revised Statutes, Sections 441, 441-A; *Reif* v. *Barrett*, 355 Ill. 104.

Upon delivery of merchandise by a seller to a common carrier for transportation, pursuant to contract of sale, title passes to the purchaser. *City of Carthage* v. *Duvall*, 202 Ill. 234; *Golo Slipper Co.* v. *Hamilton Shoe Stores Co.*, 43 F. (2d) 33, 34; *United States* v. *Hecht*, 11 F. (2d) 128, 135; *In re Arctic Stores*, 258 Fed. 688, 690. Under a contract of sale, f.o.b. a certain point, title passes

to the buyer at the time of delivery to the carrier at that point. *Price* v. *Neiman Bros. Co.*, 240 Ill. App. 157, 162; *Nelson Bros.* v. *Perryman-Burns*, 48 F. (2d) 99, 100; *Higgins* v. *California Prune Growers*, 16 F. (2d) 190, 192; *Hoffman* v. *Gosline*, 172 Fed. 113, 117. When this vendor delivered the merchandise to the carrier in Chicago, receiving bills of lading acknowledging receipt of the merchandise, under contracts of sale providing for delivery f.o.b. Chicago title passed to the purchaser. Performance of the contract of sale was completed in Illinois, *People* v. *Young*, 237 Ill. 196 at 201. The seller parted with its title there; the purchaser acquired title there. Thereafter the property was that of the vendee, and the seller had no interest therein. The property was from that time thenceforth under the domain and control of the buyer, who alone was endowed with the right to recover for damage thereto in transit, *Pacific Exp. Co.* v. *Spaulding & Co.*, 199 Ill. App. 474. The sales were completed in Illinois, title passed in Illinois, and the taxes assessed in no wise conflict, infringe upon or cast a burden upon interstate commerce.

It may well be that these well-known principles of law as to the passing of title do not apply if it appears that the parties intended differently; but the record is silent as to any such intention. It discloses merely that it was known to both parties that the railroad intended, after receiving the purchased wares, to transport them to points outside the state. And it appears further that the railroad considered itself the owner of the merchandise after delivery in Chicago, for the testimony was that it transported its own materials to points outside the state.

True, when a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. But the

carrying of goods in carts, trucks or other vehicles to the depot where the journey is to commence is no part of such commerce. *Coe* v. *Errol,* 116 U. S. 517. The intent to forward the property, after being received, to another state does not exempt it from taxation. *Bacon* v. *Illinois,* 227 U. S. 504; *Minnesota* v. *Blasius,* 290 U. S. 1. The goods "were delivered to the so-called consignee before they started and were in its hands throughout," to do with as it liked. *Superior Oil Company* v. *Mississippi,* 280 U. S. 390. The purchase and supply of equipment for uses which constitute interstate commerce is not so identified with that commerce as to make the sale immune from a tax imposed by the state. *Eastern Air Transport, Inc.* v. *South Carolina Tax Commission,* 285 U. S. 147. In *Edelman* v. *Boeing Air Trans. Inc.,* 289 U. S. 249, the court said that a state may validly tax the "use" to which gasoline is put in withdrawing it from storage within the state and placing it within the tanks of the planes, notwithstanding its ultimate function is to generate motive power for carrying on interstate commerce. Of similar import is *Nashville, C. & St. L. R. Co.* v. *Wallace,* 288 U. S. 249.

The bare fact that one intends to transport material purchased in interstate commerce does not relieve him from non-discriminatory state taxation which adds to the cost of his business. And taxation measured by gross receipts from interstate commerce has been sustained when fairly apportioned to the commerce carriers of others within the taxing state. In still other cases, taxation has been rejected only because the apportionment was found to be inadequate or unfair. *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250. Here the taxation produces no direct burden on commerce but only the same incidental and indirect effect which results from the pay-

ment of property taxes or of like taxes by residents of Illinois; it cannot amount to a regulation of interstate commerce. *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459. In *Graybar Electric Co., Inc.* v. *Curry,* 189 So. 186, affirmed, 308 U. S. 513, where a company had entered into a contract of sale requiring that certain merchandise be shipped in interstate commerce, and the question was whether such transaction was exempted from the state sales tax on the ground that it constituted a burden upon interstate commerce, the court said:

"* * * It was no benefit to the purchasers that the goods were to be shipped 'in interstate movement' for the reason that the price of the goods would be the same, whether shipped 'in interstate movement' or not. Evidently this provision as to 'interstate movement' was to preclude, if possible, the imposition of a sales tax on the goods in Alabama. The transactions were Alabama sales within the provision of the Alabama Sales Tax Law. The form or language of the customers' orders cannot affect the case.

"It is not 'within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business, protected by the commerce clause.' "

In *McGoldrick, Comptroller of the City of New York* v. *Berwind-White Coal Mining Co.,* 309 U. S. 33, a seller, with sales offices in New York, contracted there to sell and deliver in that city, coal produced at its mines in Pennsylvania and shipped to New York for delivery. The city imposed a tax upon the purchases, measured by the sales price under a statute so providing. The Supreme Court held that such tax did not infringe the commerce clause of the constitution; that it was assessed upon transfer of

title, consummated wholly within the state. The court could find no adequate ground for holding that the tax was a regulation which, in the absence of Congressional action, the commerce clause forbids. Mr. Justice Stone writing the opinion, used this language:

"* * * the extension of the immunity of the commerce clause contended for would be at the expense of state taxing power by withholding from taxation property and transactions within the state without the gain of any needed protection to interstate commerce. * * * we have sustained the tax where the course of business and the agreement for sale plainly contemplated the shipment interstate in fulfillment of the contract. *Wiloil Corporation* v. *Pennsylvania, supra,* 173; *Graybar Electric Co.* v. *Curry, supra.* * * * Taxation of property or the exercise of a power over it immediately preceding its previously contemplated shipment interstate has been similarly sustained. *Coe* v. *Errol, supra; Bacon* v. *Illinois, supra; Federal Compress & Warehouse Co.* v. *McLean,* 291 U. S. 17. For reasons already indicated all such taxes upon property or the exercise of the powers of ownership stand in no different relation to interstate commerce and have no different effect upon it than has the present sales tax upon goods whose shipment interstate into the taxing state was contemplated when the contract was entered into."

It is not a question of whether Congress might rightfully intervene with regulatory legislation. Nor are we concerned with the question of how far the Congress might legitimately go in legislation affecting the validity of the state tax, for it has not seen fit to take any action in that respect. In view of the statements by Mr. Justice Stone in the case last cited, in the absence of Congressional action, I feel that the court is not justified in con-

cluding that the tax unlawfully burdens interstate commerce.

For these reasons, I believe the judgment should be reversed.

Endorsed: Filed July 23, 1940. Kenneth J. Carrick, Clerk.

APPENDIX B.

OPINION RENDERED IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In the Matter of
GLOBE VARNISH COMPANY,
A Corporation,
Debtor.
S. L. NUDELMAN, Director of Finance of the State of Illinois,
Claimant,
vs.
GLOBE VARNISH COMPANY,
A Corporation,
Debtor.

Proceedings for Corporate Reorganization Under Section 77-B
No. 68333

MEMORANDUM.

This matter comes on to be heard on the exceptions of the Debtor to the Supplemental Report of Carl R. Chindblom, Referee in Bankruptcy, as Special Master, which report recommended the allowance of Claim No. 47, in the sum of $1594.87, filed by the Illinois Department of Finance.

Claim No. 47 is for taxes levied by authority of the Illinois Retailers Occupation Tax Act (Sec. 441, Chap. 120, Ill. Stats.) which reads in part:

"A tax is imposed upon persons engaged in the busi-

ness of selling tangible personal property at retail in this State at the rate of two per cent of the gross receipts from such sales in this State of tangible personal property made in the course of such business * * *. However, such tax is not imposed upon the privilege of engaging in any business in interstate commerce or otherwise, which business may not, under the constitution and statutes of the United States, be made the subject of taxation by this State."

The taxes were imposed on receipts from certain sales of paints and varnishes made by the Debtor, Globe Varnish Company, located in Chicago, Illinois.

The larger part of the claim represents taxes on receipts from sales made by the Debtor to various railroad companies having purchasing departments in Chicago. The materials purchased were shipped, on orders of the railroads' Chicago purchasing departments, to various cities outside the state of Illinois, to be used by the railroads in their repair shops.

The Debtor contends that the receipts from these sales to the railroads are not taxable under the Retailers Occupation Tax Act of Illinois.

17 The Act provides (Sec. 451, Chap. 120 Ill. Stats.):

"The department (of Finance) is authorized to make, promulgate, and enforce such reasonable rules and regulations relating to the administration and enforcement of the provisions of this Act as may be deemed expedient."

The brief of the State sets forth certain rules promulgated pursuant to the above-quoted statutory provision, and, among others, the following:

"Sales of fuel, equipment and supplies in Illinois to railroad companies for use or consumption constitute

sales within the meaning of the Retailers' Occupation Tax Act. Such transactions are not in interstate commerce if delivery of fuel, equipment and supplies pursuant to the sale is made by the seller from one point in Illinois to a second point in Illinois. It is immaterial that, subsequent to the sale, the purchasing railroad company may transport the goods outside Illinois for use or consumption, since such interstate movement is not a part of the sale of the goods to the user or consumer." (Rule 76.)

"The primary characteristic of interstate commerce as it relates to the Retailers' Occupation Tax is the physical movement of tangible personal property across State boundary lines as an essential and not an incidental part of the sale of such tangible personal property.

* * * * *

"The tax does not extend to gross receipts from sales in which the seller is obligated under the terms of the agreement to make physical delivery of the goods sold from a point in the State to a point outside the State. Nor does the tax apply to receipts from a sale where the seller, by carrier or by mail, delivers the goods sold from a point in this State to a point outside the State, on order of the buyer. It is immaterial whether the goods are sold f.o.b. origin or f.o.b. destination." (Rule 5.)

18 The evidence shows that the railroads' printed order blanks directed the Debtor to ship the materials to the railroads at points outside the State, that the Debtor trucked the materials to the freight stations of the railroad companies in Chicago, and that the station agents issued to Debtor a carbon copy of a bill of lading, acknowledging receipt of the merchandise from the debtor, as shipper. An assistant purchasing agent of one of the railroads testified:

"This practice is no different in buying material today than it has been in the 24 years that I have been in the department. We have the shop at Milwaukee, and we have to service it with material. We have a freight station at Chicago, at Union Street, which accepts deliveries by truck from the various manufacturers, and we haul it to our shop at Milwaukee." (R. 71.)

* * * * *

"This particular shipment, when it comes to our freight station, is handled by our freight department, and their own way bill is issued, in accordance with the bill of lading, placed in a car and transported to the destination as shown on here (referring to the bill of lading)." (R. 77.)

The court is of the opinion that, under the terms of the agreements between the Debtor and the railroads, the movement of the materials across State lines was an essential part of the sales, and that, therefore, the sales were transactions in interstate commerce and not subject to the tax. Said claim should be disallowed to the extent that it represents taxes on the receipts from sales of this kind to the railroads.

19 As to the sales of paints and varnishes made by the Debtor to painting contractors within the state of Illinois, the Debtor contends that the receipts for those sales should not be taxed because they were not "sales at retail" within the meaning of Section 1 of the Act which contains this definition (Sec. 440, Chap. 120, Ill. Stats.):

" 'Sales at retail' means any transfer of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration."

The recently decided case of *Acme Printing Ink Co.* v. *Nudelman,* 371 Ill. 217, appears to be in point here. In

that case it was held that those engaged in the business of manufacturing and selling printing ink to printers and lithographers are subject to the Retailers' Occupation Tax Act, as the printers and lithographers are the users or consumers of the printing ink in the production of printing matter, and the ink is tangible personal property in which personal service, skill and artistic ability have entered only to a comparatively small degree, the primary occupation being the manufacture and sale of the ink and not the rendering of service. The court believes that the sales to the painting contractors were "for use or consumption and not for resale" and that the claim should be allowed to the extent that it represents a tax on the receipts from sales to the painting contractors.

Counsel for the Debtor may, at 10 o'clock A. M., on Wednesday, July 5, 1939, present a draft of an order giving effect to the views herein expressed.

Barnes
Judge.

June 29, 1939.

Supreme Court, U. S.
FILED
JAN 29 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 662

IN THE MATTER OF GLOBE VARNISH COMPANY, A CORPORATION, DEBTOR.

S. L. NUDELMAN, DIRECTOR OF FINANCE OF THE STATE OF ILLINOIS,
Petitioner,

vs.

GLOBE VARNISH COMPANY, A CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OBJECTION TO JURISDICTION
and
BRIEF FOR THE RESPONDENT IN OPPOSITION.

MARCUS J. GOLDEN,
THURLOW G. ESSINGTON,
RUSSELL WHITMAN,
WILLIAM P. SIDLEY,
Counsel for Respondent.

HAMILTON K. BEEBE,
CLAUDE H. COON,
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Petitioner,

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GLOBE VARNISH COMPANY, A CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OBJECTION TO JURISDICTION.

The petitioner is not a party to the cause.

The jurisdiction of this Court is sought to be invoked by petitioner under Section 240 (a) of the Judicial Code, as amended, 28 U. S. C. A. 347 (a), providing that it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, to require by certiorari that a cause be certified to this Court by a Circuit Court of Appeals for determination.

By the Act of February 13, 1925, 28 U. S. C. A. 350, it is provided that no writ of certiorari, intended to bring any judgment or decree before this Court for review, shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree. The judgment of the Circuit Court of Appeals which petitioner seeks to have reviewed was entered on July 23, 1940. (R. 112) A petition for rehearing was filed on August 6, 1940 (R. 112), and thereafter, on October 1, 1940, said petition for rehearing was denied (R. 113).

On December 31, 1940, three months after the date of the denial of said petition for rehearing, the petition for writ of certiorari was filed with the Clerk of this Court seeking a review of said final judgment of the Circuit Court of Appeals.

The original claim for Retailers' Occupation Tax was filed in the District Court of the United States for the Northern District of Illinois (R. 3), and the appeal to the Circuit Court of Appeals was prosecuted by S. L. Nudelman, Director of Finance of the State of Illinois.

Subsequent to the denial of the petition for rehearing by the Circuit Court of Appeals and on October 9, 1940, S. L. Nudelman resigned as Director of Finance of the State of Illinois, and, on the same day, A. M. Carter was duly appointed and qualified as such Director of Finance, all as fully appears by the duly exemplified certificates of the Secretary of State of the State of Illinois on file with the Clerk of this Court and exact copies of which are set forth in Appendix *infra*.

At the time the petition for writ of certiorari was filed with this Court by said S. L. Nudelman, he was completely separated from the office of Director of Finance

of the State of Illinois and totally without right to invoke such a review or exercise any authority or discretion in regard to a review of said judgment.

It therefore appears that no petition for writ of certiorari was filed in this Court by *any party* having authority to invoke the jurisdiction of this Court within the three months' period prescribed by statute.

A similar situation was presented to this Court in the case of *Davis* v. *Preston,* 280 U. S. 406, 74 L. ed. 514, arising under Section 206 of the Transportation Act of 1920, as amended, 49 U. S. C. A. 74 (h). In that case, a judgment was obtained against James C. Davis, as Federal Agent, which was affirmed by the Supreme Court of the State of Texas. Within the statutory three months' period of time, Davis, describing himself as Federal Agent, petitioned this Court for a review on certiorari and the petition was granted. Upon oral argument of the case before this Court it appeared that, at the time the petition for certiorari was filed, Davis had ceased to be Federal Agent and had been succeeded in that office by Andrew W. Mellon. In denying a motion for substitution and in dismissing the writ of certiorari, this Court stated on pages 408 and 409:

> "The succession in office, as now appears, occurred before there was any effort to obtain a review in this court. After the succession Davis was completely separated from the office and without right to invoke such a review or exercise any authority or discretion in that regard. Therefore his petition must be disregarded. The time within which such a review may be invoked is limited by statute and that time has long since expired. To grant the motion in these circumstances would be to put aside the statutory limitation and to subject the party prevailing in the state court to uncertainty and vexation which the limitation is intended to prevent.

"The provisions relating to substitution which were added to Section 206 of the Transportation Act of (February 28) 1920 (41 Stat. at L. 461, chap. 91) by the Act of March 3, 1923, chap. 233, 42 Stat. at L. 1443, U. S. C. title 49, Section 74, are cited in support of the motion. But, even when they are liberally construed, as they probably should be, they disclose no purpose either (a) to enable a former Federal Agent to invoke a review by this court of a judgment which is of no legal concern to him, or (b) to modify or enlarge the prescribed statutory period for invoking the reviewing power of this court."

For the reasons hereinabove set forth, respondent submits that this Court has no jurisdiction to entertain the petition for writ of certiorari filed herein by S. L. Nudelman after he had resigned as Director of Finance.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court of the United States for the Northern District of Illinois, Eastern Division, is not reported but appears in the record at pages 81 to 84 and in the appendix to petition for certiorari at pages 59 to 63. The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 114 F. (2d) 916.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, 28 U. S. C. A. 347 (a). The date of the judgment sought to be reviewed is July 23, 1940. (R. 112) A rehearing was denied on October 1, 1940. (R. 113)

QUESTION PRESENTED.

Is the commerce clause of the Federal Constitution violated by the levy by the State of Illinois of a Retailers' Occupation Tax measured by the receipts from a sale to a railroad of goods which are required, by the contract of sale, to be shipped via such railroad to a foreign state to be there used or consumed?

STATUTES INVOLVED.

Section 2 of the Retailers' Occupation Tax Act (Section 441, Chapter 120, Illinois Revised Statutes, 1937), provides as follows:

> "A tax is imposed upon persons engaged in the business of selling tangible personal property at retail in this State at the rate of two per cent (2%) of the gross receipts from such sales in this State of tangible personal property made in the course of such business upon and after the taking effect of this Act and prior to July 1, 1935, and at the rate of three per cent (3%) of the gross receipts from such sales on and after July 1, 1935, and prior to February 15, 1939, and two per cent (2%) of the gross receipts from such sales after February 14, 1939. However, such tax is not imposed upon the privilege of engaging in any business in interstate commerce or otherwise, which business may not, under the Constitution and statutes of the United States, be made the subject of taxation by this State."

Section 12 of the Act (Section 451, Chapter 120, Illinois Revised Statutes, 1937), provides in part:

> "The department [of Finance] is authorized to make, promulgate, and enforce such reasonable rules and regulations relating to the administration and enforcement of the provisions of this Act as may be deemed expedient."

STATEMENT OF THE CASE.

In the reported opinion of the Circuit Court of Appeals that Court has set forth, concisely and accurately, the transaction upon which the tax is sought to be imposed, as follows:

> "The facts are not disputed. The debtor was engaged in selling tangible personal property

for use or consumption. It is an Illinois corporation with its main place of business in Chicago. The railroad companies to whom the sales in question were made had offices and freight stations in that city. The transactions of sale were all similar, and Exhibit 1, which is an order for paint, is typical. That exhibit was a written order placed by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (hereinafter referred to as the Railroad) with the debtor for nine drums black locomotive finishing paint, in 55 gallon, one-time containers, at $1.10 per gallon, f.o.b. Chicago. The order requested the debtor to ship the order to the Railroad, care of storekeeper (consignee) 1029-183, (Destination) Milwaukee Shops, Wisconsin, via the Railroad, junction nearest point of shipment, unless otherwise specified. The routing instructions contained the following: 'Deliver to C. M. St. P. & P. R. R. Freight Station.' The order further stated that the receipted bill of lading must accompany the invoice and be sent to the purchasing agent, and that the seller should strictly comply with all instructions and specifications.

"The debtor complied with the order in all respects and delivered the paint properly consigned to the consignee at Milwaukee, to the freight station of the railroad named, together with a standard form of bill of lading prescribed by the Interstate Commerce Commission. It was receipted by the freight agent, and a copy given to the debtor and the shipment was handled precisely as it would have been handled had the consignee been a purchaser other than the Railroad, that is to say, a way bill was issued in accordance with the bill of lading, the paint was placed in the car and transported directly to the destination at Milwaukee, Wisconsin. This method of sale and delivery had been pursued by the parties in precisely the same manner for twenty-four years."

S. L. Nudelman, as Director of Finance, in reorganization proceedings of the petitioner pending in the District Court of the United States for the Northern District

of Illinois, under Section 77B of the Bankruptcy Act, as amended, filed a claim for Retailers' Occupation Tax measured by the gross receipts from sales as typified by the above transaction. The controversy arose upon objections to such claim filed by the respondent. The District Court denied said claim of petitioner and the order of the District Court was affirmed by the Circuit Court of Appeals.

ARGUMENT.

In the written memorandum of the District Judge, which appears on pages 59 to 63 of the petition (R. 81 to 84) attention is called to the following provision of the official rules issued by the Department of Finance of the State of Illinois:

> "The tax does not extend to gross receipts from sales in which the seller is obligated under the terms of the agreement to make physical delivery of the goods sold from a point in the State to a point outside the State. Nor does the tax apply to receipts from a sale where the seller, by carrier or by mail, delivers the goods sold from a point in this State to a point outside the State, on order of the buyer. It is immaterial whether the goods are sold f.o.b. origin or f.o.b. destination."

Such rule was promulgated pursuant to the Retailers' Occupation Tax Act. Section 451, Chapter 120, Illinois Revised Statutes, 1937. This provision has not been changed and is still in effect.

The foregoing long-established rule serves as a conclusive answer to the petitioners' "Reasons Relied on for the Allowance of the Writ."

Pages 9 and 10 of the Petition Considered.

Petitioner's first contention is that the Circuit Court of Appeals decided an important question of local law in a way probably in conflict with a state statute because, when, considering the applicability of the Occupation Tax to the type of sale here involved, it stated: "In the instant case, we think it makes no difference when the

titled passed, * * *." Petitioner then asserts that the refusal of the Circuit Court of Appeals to rely on passage of title as the determining factor in determining the applicability of the Retailers' Occupation Tax Act conflicts with the definition in the Act of a "sale at retail." This strained effort to find a conflict with a state statute must be unavailing for the above-quoted rule expressly recognizes that technical considerations of passage of title do not affect the question of liability for the tax.

Pages 11 and 12 Considered.

Petitioner asserts that the decision of the Circuit Court of Appeals is in conflict with and nullifies the so-called uniformity clause of the Illinois Constitution. It is also said that an important question of local law has been decided in a way probably in conflict with applicable local decisions.

To support these contentions, petitioner refers to Illinois cases holding that statutory attempts to exempt sales by specific classes of retailers from the operation of the Retailers' Occupation Tax Act violate the State Constitution. Petitioner then says that the decision below "has the effect of exempting from the Act * * * the sale of tangible personal property at retail to railroads." This statement is, of course, incorrect since the court below was concerned only with a particular type of sales to railroads, *i. e.*, those in which the purchase order specifies an out-of-state destination. But what is more, the decision below by no means created an exemption; instead, it enforced uniformity by applying to sellers to railroads the Department rule applicable to all other retailers:

> "Nor does the tax apply to receipts from a sale where the seller, by carrier or by mail, delivers the

goods sold from a point in this State to a point outside the State, on order of the buyer."

The quoted provision applies literally to the facts of the sales transaction here. Petitioner has sought to penalize the respondent for failing to make the delivery "by carrier" over another railroad than that operated by the buyer. The Circuit Court of Appeals has held that the identity of the carrier is not controlling. The result is that all sellers are treated alike, as is required by Article IX, Section 1 of the Illinois Constitution.

Pages 12 and 13 Considered.

Under Point 3 petitioner asks this Court to decide the important question as to whether a state of origin may, under the Federal Constitution, impose a sales tax (or its equivalent) on interstate sales. As shown by the express terms of the rule of the Department of Finance already quoted, *no attempt has been or is now made to tax receipts from interstate sales where Illinois is the state of origin.* Whether an attempt to tax such sales should be made is purely a question of local policy. Under such circumstances it is not appropriate that the question now urged by the petitioner be decided on this record.

Pages 14 to 16 of Petition and Pages 23 to 44 of Brief Considered.

Under point 4 petitioner sets forth six propositions of law with citations of authorities in support of his contention that the Circuit Court of Appeals has decided this case in a way probably in conflict with applicable decisions of this Court. Pages 23 to 44 are devoted to a detailed discussion of these cases.

Under the rules of this Court it would be improper for

respondent to file a brief of the length required to discuss each of these cases. Our argument on this point will, therefore, be confined to recent cases, which we submit are in harmony with the decision of the Circuit Court of Appeals.

It is not necessary that the goods be delivered by the seller to an independent common carrier for transportation to the buyer beyond the boundary of the state of origin to constitute interstate commerce.

In the recent case of *Southern Pacific Co.* v. *Gallagher,* (1939) 306 U. S. 167, 177, 83 L. ed. 586, 593, this Court recognized that goods being transported under circumstances identical with those in the present case were traveling in interstate commerce and were exempt from state taxation. There, the railroad had purchased goods outside of California and was transporting them on company material waybills without transportation charge to a point within California. A tax was imposed by California upon the use and storage of the goods after they reached their destination within that state. In upholding the tax, this Court said, page 177:

> "We think there was a taxable moment when the former had reached the end of their interstate transportation and had not begun to be consumed in interstate operation."

By its emphasis on the taxable moment after the interstate movement, the Court recognized that during such movement the goods were moving in interstate commerce and not subject to state tax.

The Pipe Line Cases, (1914) 234 U. S. 548, 561-562, 58 L. ed. 1459, 1471, cited by the petitioner, are authority for the proposition that interstate commerce is involved, even where the goods being transported are the property

of the carrier, providing the transportation was part of a commercial transaction. The situation there presented by the transportation by the Uncle Sam Oil Company solely of its own oil from its own oil wells in Oklahoma to its own refinery in Kansas did not involve a commercial transaction, since the transportation *neither* began in purchase, nor ended in sale, nor was the Uncle Sam Oil Company a common carrier. The petitioner argues that the transaction has a commercial character only where the transportation begins in purchase and ends in sale, but obviously either the purchase or the sale is commerce and renders the interstate movement, of which it is an integral part, a transaction in interstate commerce.

This distinction was recently noted by this Court in *Valvoline Oil Company* v. *United States* (1939), 308 U. S. 141, 143, 145, 146, 84 L. ed. 151, 153, 154, which involved interstate transportation by the oil company to its Pennsylvania refineries of oil which it had purchased in states served by its pipe line. The oil company contended that it was not subject to the jurisdiction of the Interstate Commerce Commission. Its contention was set out in the opinion as follows (page 143):

> "Because, thus, it does not transport interstate other oil than that which it purchases at the well for its own use, Valvoline claims that it is not a common carrier of oil subject to the Interstate Commerce Act, * * *."

Despite the fact that the oil was for the company's own use and the transportation did not end in sale, the Court held that the interstate movement of the oil was commerce and pointed out that as the oil was *purchased* before transportation, the decision concerning the Uncle Sam Oil Company in *The Pipe Line Cases* was not applicable. The Court stated, pages 145, 146:

"Whether the oil so owned and transported was

ultimately used by the carrier in its own operations or sold to others was in this connection immaterial. * * * This was covered by the Pipe Line decision. There it was stated that commerce is not dependent on title, 'and *the fact that the oils transported belonged to the owner of the pipe line is not conclusive against the transportation being such commerce.*' * * *

"The appellant relies upon the Pipe Line Cases to show that the present act does not cover a pipe line transporting oil for its own refining purposes only. The discussion referred to is that concerning the Uncle Sam Oil Company. But that company's pipe line was used for the 'sole purpose of conducting oil from its own wells to its own refinery.' This was held not to be transportation under the Act. Here, however, *it is the purchase* from many sources *and subsequent carriage that determine the applicability of the statute to Valvoline.*" (Italics ours.)

In *Northwestern Improvement Company, Petitioner,* v. *Harold L. Ickes, et al., Respondents* (1940), 111 F. (2d) 221, 223, 224, the United States Circuit Court of Appeals for the Eighth Circuit held that sales of coal to a railroad for transportation over its own line to points outside the state were transactions in interstate commerce. The petitioner sought to reverse an order of the National Bituminous Coal Commission refusing to exempt petitioner from the provisions of the Bituminous Coal Act of 1937 with respect to its sales of bituminous coal to the Northern Pacific Railway Company on the ground that such sales did not constitute interstate commerce. It appeared that after purchase, much of the coal sold was transported by the purchasing Railway Company across state lines.

The Court stated the questions involved in the following language, on page 223:

"It appears, therefore, that the controlling question presented is embodied in the following conten-

tions of petitioner in its brief: (a) Petitioner's sales of coal to the Railway Company are purely local transactions; (b) the transportation by a common carrier railroad of its own fuel coal is not commerce; (c) the fact that the coal sold becomes an instrumentality by which interstate commerce is conducted, cannot justify the type of regulation of the terms of sale represented by the Bituminous Coal Act of 1937."

The Court cited the familiar rule that "where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation", and held that "interstate commerce includes the transactions of purchase here involved."

In holding that the transportation by the railroad of its own coal constituted interstate commerce, the Court, at page 224, discussed the case of *Delaware, Lackawanna & Western R. R. Co.* v. *United States*, 231 U. S. 363, 58 L. ed. 269, and stated:

> "Therefore, the conclusion in that case necessarily answers the contention of petitioner that the transportation by a common carrier railroad of its own fuel is not *commerce*, and cannot justify the type of regulation prescribed by the Bituminous Coal Act of 1937." (Italics ours.)

As the buyer's state (foreign) has the right to levy an equivalent tax on the goods sold, Illinois can not validly impose a tax measured by the proceeds of the sale since this would result in two taxes upon an interstate sale as compared to one upon a local sale.

It was held in *Southern Pacific Co.* v. *Gallagher* (1939), 306 U. S. 167, 83 L. ed. 586, that where goods purchased by a carrier for its own use and transported across state lines in its own cars (under exactly the same circum-

stances as were present in the instant case) have reached the end of their interstate journey, the state of destination may impose a tax substantially equivalent in its operation to the Illinois Retailers' Occupation Tax on the use or storage of the goods in the buyer's state.

Under the principles sustained in the *Southern Pacific* case, the State of Wisconsin, or any other state of destination of interstate shipments such as those now involved, could impose a "use tax" affecting the goods subsequent to their arrival in the destination state. Such a tax might exempt from its operation goods which had previously been subjected to sales or occupation tax in the *buyer's* state, as was true under the California statute considered in the *Southern Pacific* case. This exemption from the use tax of goods already taxed locally, would result in a single tax upon intrastate sales as compared with two taxes (one in the seller's state and one in the buyer's state) upon interstate sales. Thus, there would be an actual and substantial discrimination in favor of intrastate business operating to prejudice sales involving interstate transportation.

The fact that Wisconsin, or some other buyer's state, may not have such a use tax at the present time is immaterial. This was emphasized by Mr. Justice Stone in his discussion in *Western Live Stock* v. *Bureau of Revenue* (1938), 303 U. S. 250, 260, 82 L. ed. 823, 831, of the Court's earlier decision in *Fisher's Blend Station* v. *Tax Commission* (1936), 207 U. S. 650, 80 L. ed. 956. In the *Fisher's Blend* case a tax measured by gross receipts derived from interstate radio broadcasting was held invalid. Mr. Justice Stone pointed out, on page 260 of the *Western Live Stock* case, in distinguishing the *Fisher's Blend* case, that a cumulative tax burden might have there resulted from the tax on *broadcasting* since

radio reception might also have been subjected to tax. *There was no indication that any state had as yet attempted to levy a tax on reception,* but it was noted that Great Britain levied such a tax.

Similarly, in *Gwin, White & Prince* v. *Henneford* (1939), 305 U. S. 434, 440, 83 L. ed. 272, 276, in referring to the possibility of a multiple tax burden if a tax such as there involved was held valid, the Court said, at page 440:

> "Such a multiplication of state taxes, each measured by the volume of the commerce, would reestablish the barriers to interstate trade which it was the object of the commerce clause to remove. Unlawfulness of the burden depends upon its nature, measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that some other state may first have subjected the commerce to a like burden."

In the case of *Western Live Stock* v. *Bureau of Revenue* (1938), 303 U. S. 250, 255, 82 L. ed. 823, 828, the tax, based upon the gross receipts from the sale of advertising space, was sustained because the Court was convinced that, under the facts there involved, the activity by which the tax was measured could not have been subjected to an equivalent imposition by any other state. The Court stated that if the business had been subject to a similar tax by other states, the New Mexico statute could not have been sustained. On page 255, the Court said:

> "The vice characteristics of those [taxes] which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, *in point of substance,* of being imposed [citing cases] or added to [citing cases] with equal right by every state which the commerce touches, merely because interstate commerce is being done,

> so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce." (Italics ours.)

It will be noted that identical impositions are not required; a cumulative burden results where the taxes are equivalent in "point of substance".

The possibility of a cumulative burden upon interstate commerce influenced the decision in the case of *J. D. Adams Mfg. Co.* v. *Storen,* (1938) 304 U. S. 307, 311, 82 L. ed. 1365, 1369. In that case this Court held that the Indiana gross income tax could not legally be applied to gross receipts from transactions in interstate commerce. At pages 311-312, the Court said:

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, Section 8 of the Constitution. The opinion of the State Supreme Court stresses the generality and non-discriminatory character of the exaction but it is settled that this will not save the tax if it directly burdens interstate commerce."

Southern Pacific Co. v. *Gallagher,* (1939) 306 U. S. 167, 83 L. ed. 586, and cases such as *Graybar Electric Co., Inc.* v. *Curry,* (1939 Ala.) 189 So. 186, aff'd 308 U. S. 513, 84 L. ed. 437, and *McGoldrick* v. *Berwind-White Coal Mining Co.* (1940), 309 U. S. 33, 84 L. ed. 565, have sustained the authority of the buyer's state to tax the sale or use of

goods which have arrived at their destination after interstate transportation. If the seller's state is also to be permitted to impose a tax having an equivalent result, a multiple burden will be imposed upon interstate commerce. At page 12 of his petition, petitioner admits what is universally recognized in practice, that the Illinois Retailers' Occupation Tax is a form of sales tax. If Illinois is permitted to impose this tax on interstate sales when it is the state of origin, a practical discrimination against interstate commerce will result.

CONCLUSION.

It is respectfully submitted (a) that this Court has no jurisdiction to entertain the petition for writ of certiorari as the petition was not filed by *any party to the cause,* and (b) that the case raises no new question of general interest but involves merely the application of settled principles of law to the facts of this case. The decision of the court below is correct. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

MARCUS J. GOLDEN,
THURLOW G. ESSINGTON,
RUSSELL WHITMAN,
WILLIAM P. SIDLEY,
Counsel for Respondent.

HAMILTON K. BEEBE,
CLAUDE H. COON,
J. EDWARD DAY,
Of Counsel.

UNITED STATES OF AMERICA, STATE OF ILLINOIS, } ss. OFFICE OF THE SECRETARY OF STATE.

I, EDWARD J. HUGHES, Secretary of State of the State of Illinois, do hereby certify that [redacted] S. L. NUDELMAN WAS APPOINTED ON JUNE 21ST, 1939 DIRECTOR OF FINANCE AND ACTED IN THAT CAPACITY UNTIL HE RESIGNED ON OCTOBER 9TH,1940

[redacted]e.

In Witness Whereof, I hereunto set my hand and affix the Great Seal of State. Done at the City of Springfield, this 20TH day of JANUARY A. D. 1941.

Edward J. Hughes
Secretary of State.

UNITED STATES OF AMERICA, STATE OF ILLINOIS, } ss. EXECUTIVE DEPARTMENT.

DWIGHT H. GREEN

I, [redacted], Governor of the State of Illinois, do hereby certify that EDWARD J. HUGHES, who signed the foregoing certificate, was at the time of signing the same and is now, Secretary of State of the State of Illinois, duly elected and qualified to that office, and that full faith and credit are due his official attestations; that he is the custodian of the above documents and authorized by law to certify to same, and that the same is in due form and by the proper officer; and that he is the custodian of the Great Seal of State of the State of Illinois.

In Witness Whereof, I hereunto set my hand. Done at the City of Springfield, this 20TH day of JANUARY 19 41

Dwight H. Green
Governor.

UNITED STATES OF AMERICA, STATE OF ILLINOIS, } ss. OFFICE OF THE SECRETARY OF STATE.

DWIGHT H. GREEN

I, EDWARD J. HUGHES, Secretary of State of the State of Illinois, hereby certify that [redacted], who signed the foregoing certificate, was at the time of signing the same, and is now, Governor of the State of Illinois, duly elected and qualified, and that as such, full faith and credit is, and ought to be, given to his official attestations; and I further certify that under the Constitution and laws of the State of Illinois, the Secretary of State is the custodian of the Great Seal of State, and that the Governor has no official seal. And I further certify that the foregoing signature is the genuine signature of DWIGHT H. GREEN [redacted], Governor, and that the foregoing certificate signed by him is in due form.

In Testimony Whereof, I hereunto set my hand and cause to be affixed the Great Seal of State. Done at the City of Springfield, this 20TH day of JANUARY A. D. 19 41

Edward J. Hughes
Secretary of State.

UNITED STATES OF AMERICA,
STATE OF ILLINOIS, } ss. OFFICE OF THE SECRETARY OF STATE.

I, EDWARD J. HUGHES, Secretary of State of the State of Illinois, do hereby certify that ~~the following~~ A. M. CARTER WAS APPOINTED DIRECTOR OF FINANCE ON OCTOBER 9TH, 1940 AND ACTED IN THAT CAPACITY UNTIL JANUARY 13TH, 1941 AND THEREFORE, WAS DIRECTOR OF FINANCE ON DECEMBER 31st, 1940.

~~[illegible]~~

IN WITNESS WHEREOF, I hereunto set my hand and affix the Great Seal of State. Done at the City of Springfield, this 20TH day of JANUARY A. D. 19 41.

Edward J. Hughes
Secretary of State.

UNITED STATES OF AMERICA,
STATE OF ILLINOIS, } ss. EXECUTIVE DEPARTMENT.

I, DWIGHT H. GREEN, Governor of the State of Illinois, do hereby certify that EDWARD J. HUGHES, who signed the foregoing certificate, was at the time of signing the same, and is now, Secretary of State of the State of Illinois, duly elected and qualified to that office, and that full faith and credit are due his official attestations; that he is the custodian of the above documents and authorized by law to certify to same, and that the same is in due form and by the proper officer; and that he is the custodian of the Great Seal of State of the State of Illinois.

IN WITNESS WHEREOF, I hereunto set my hand. Done at the City of Springfield, this 20TH day of JANUARY 19 41

Dwight H. Green
Governor.

UNITED STATES OF AMERICA,
STATE OF ILLINOIS, } ss. OFFICE OF THE SECRETARY OF STATE.

I, EDWARD J. HUGHES, Secretary of State of the State of Illinois, hereby certify that DWIGHT H. GREEN who signed the foregoing certificate, was at the time of signing the same, and is now, Governor of the State of Illinois, duly elected and qualified, and that as such, full faith and credit is, and ought to be, given to his official attestations; and I further certify that under the Constitution and laws of the State of Illinois, the Secretary of State is the custodian of the Great Seal of State, and that the Governor has no official seal. And I further certify that the foregoing signature is the genuine signature of DWIGHT H. GREEN, Governor, and that the foregoing certificate signed by him is in due form.

IN TESTIMONY WHEREOF, I hereunto set my hand and cause to be affixed the Great Seal of State. Done at the City of Springfield, this 20TH day of JANUARY A. D. 1941.

Edward J. Hughes
Secretary of State.